(1)

No. 96-9187-CSY
Status: DECIDED
CAPITAL CASE

Title: Arthur Brown, Jr., Petitioner
v.
Texas

Docketed:
May 30, 1997

Court: Court of Criminal Appeals of Texas

Counsel for petitioner: Moran,Tom

Counsel for respondent: Griffey,Margaret Portman

Entry	Date	Note	Proceedings and Orders
1	May 27 1997	D	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed. (Response due August 28, 1997)
4	Jul 2 1997		Order extending time to file response to petition until July 29, 1997.
5	Aug 5 1997		Order further extending time to file response to petition until August 28, 1997.
6	Aug 26 1997		Brief of respondent Texas in opposition filed.
7	Sep 11 1997		DISTRIBUTED. September 29, 1997 (Page 139)
9	Oct 6 1997		REDISTRIBUTED. October 10, 1997 (Page 25)
11	Oct 14 1997		REDISTRIBUTED. October 17, 1997 (Page 14)
13	Oct 20 1997		Petition DENIED. Statement respecting the denial of certiorari by Justice Stevens with whom Justice Souter, Justice Ginsburg, and Justice Breyer join. (Detached opinion.)

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(2)

NO. 96-9187

U.S.
27 1997
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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1996

ARTHUR BROWN, JR.	§	PETITIONER
VS.	§	
THE STATE OF TEXAS	§	RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE TEXAS COURT OF CRIMINAL APPEALS

PETITION FOR WRIT OF CERTIORARI

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86 pp

Brown
v.
Texas

QUESTIONS FOR REVIEW -- CAPITAL CASE

1. Whether the Due Process Clause of the Fourteenth Amendment, U. S. CONST. amend. XIV, requires states to instruct juries in the law of parole as it relates to persons serving life sentences for capital murder when (1) the future dangerousness of the defendant to commit crimes of violence must be found before the death penalty may be assessed; (2) the defendant is not eligible for parole until he has served 35 calendar years of the sentence; and (3) the defendant presents evidence that as a person ages he becomes less likely to commit crimes of violence.

2. Whether a defendant charged with a capital offense is deprived of his right to Due Process as guaranteed by the Fourteenth Amendment, U. S. CONST. amend. XIV, at the punishment stage of his trial when the state trial court excludes evidence of parole eligibility when the defendant's future dangerousness is a factor that must be proven by the state and the excluded evidence is coupled with expert testimony concerning the defendant's future dangerousness.

3. Whether the Equal Protection Clause of the Fourteenth Amendment, U. S. CONST. amend. XIV, requires states to instruct juries in the law of parole in capital murder cases in which the state is seeking the death penalty when the state's statutes require that juries be instructed in the law of parole in all other felony cases in which the jury assesses punishment.

4. Whether the Cruel and Unusual Punishment Clause of the Eighth Amendment, U. S. CONST. amend. VIII, requires states to instruct juries in the law of parole as it relates to persons serving life sentences for capital murder when (1) the future dangerousness of the defendant to commit crimes of violence must be found before the death penalty may be assessed; (2) the defendant is not eligible for parole until he has served 35 calendar years of the sentence; and (3) the defendant presents evidence that as a person ages he becomes less likely to commit crimes of violence.

5. Whether a defendant's right against cruel and unusual punishment as guaranteed by the Eighth Amendment, U. S. CONST. amend. VIII, is violated when the state trial court excludes evidence of parole eligibility when the defendant's future dangerousness is a factor that must be proven by the state and the excluded evidence is coupled with expert testimony concerning the defendant's future dangerousness.

LIST OF INTERESTED PARTIES

The parties to this petition for writ of certiorari are:

1. Arthur Brown, Jr., Defendant-Petitioner.

2. The State of Texas, Plaintiff-Respondent.

3. The Hon. Lupe Salinas, in his official capacity as Judge of the 351st Judicial District Court of Harris County, Texas, trial judge.

4. The Hon. John B. Holmes, Jr., in his official capacity as District Attorney of Harris County, Texas, attorney for the State of Texas.

5. The Hon. Dan Morales, in his official capacity as Attorney General of Texas, attorney for the State.

6. Tom Moran, court-appointed attorney for Petitioner.

7. Patricia Nasworthy Saum, court-appointed attorney for Petitioner.

These representations are made so that the Justices of this Court may immediately determine if they are disqualified or should recuse themselves.

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TO THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW Petitioner, **ARTHUR BROWN, JR.**, by and through his attorneys, **TOM MORAN and PATRICIA NASWORTHY SAUM**, and, pursuant to SUP. CT. R. 12, files this petition for writ of certiorari. In support of this Petition, Petitioner would show the Court as follows:

I. STATEMENT OF JURISDICTION

This is a petition for writ of certiorari to the Texas Court of Criminal Appeals in a criminal case. The Court of Criminal Appeals is the court of last resort in Texas for criminal cases. TEX. CONST. art. V, § 5. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

Petitioner was charged with capital murder in the 351st Judicial District Court of Harris County, Texas. He was convicted and sentenced to death. The Texas Court of Criminal Appeals affirmed Petitioner's conviction in an unpublished opinion. Brown v. State, No. 71,817 (Tex. Crim. App. December 18, 1996).[1] Petitioner filed a timely motion for rehearing. The Court of Criminal Appeals overruled his motion for rehearing on February 26, 1997.[2]

This petition for writ of certiorari is due on May 27, 1997, the 90th day after the motion for rehearing was overruled.

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[1] A copy of the opinion is attached as Appendix A.

[2] A copy of the notification from the Court of Criminal Appeals overruling the motion for rehearing is attached as Appendix B.

III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The statutory and constitutional provisions involved in this petition are:

1. U. S. Const. amend. VIII.

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

2. U. S. Const. amend. XIV, § 1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Tex. Code Crim. Proc. Ann. art. 37.07 § 4 (Vernon Supp. 1993).[3]

> Sec. 4. (a) In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense of which the jury has found the defendant guilty is listed in Section 3g(a)(1), Article 42.12, of this code or if the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, of this code, unless the defendant has been convicted of a capital felony the

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[3] Unless otherwise noted, the statute currently in effect in Texas was the one that applied at Petitioner's trial, and thus Petitioner cites only the current statute. If, however, a different version of a statute was in effect at the time of Petitioner's trial, then Petitioner cites that statute.

Petitioner's offense was alleged to have occurred on June 20, 1992. (T.-7). Due to amendments to the parole laws in 1993, Petitioner cites to the version of Article 37.07 § 4 in effect at the time of the offense, Tex. Code Crim. Proc. Ann. art. 37.07 § 4(a) (Vernon Supp. 1993). Act of May 25, 1985, 69th Leg., R.S., ch. 576, 1985 Tex. Sess. Law Serv. 4446, amended by Act of May 29, 1993, 73rd Leg., R.S., ch. 900 § 5.02, 1993 Tex. Sess. Law Serv. 3589, 3746 (current version at Tex. Code Crim. Proc. Ann. art. 37.07 § 4 (Vernon Supp. 1997)).

court shall charge the jury in writing as follows:

"Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

"It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

"Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-fourth of the sentence imposed or 15 years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than six years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.

"It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

"You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant."

(b) In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense is punishable as a felony of the first degree, if a prior conviction has been alleged for enhancement of punishment as provided by Section 12.42(b), (c), or (d), Penal Code, or if the offense is a felony not designated as a capital felony or a felony of the first, second, or third degree and the maximum term of imprisonment that may be imposed for the offense is longer than 60 years, unless the offense of which the jury has found the defendant guilty

is listed in Section 3g(a)(1), Article 42.12, of this code or the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, of this code, the court shall charge the jury in writing as follows:

"Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

"It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

"Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed or 15 years, whichever is less. Eligibility for parole does not guarantee that parole will be granted.

"It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

"You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant."

(c) In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense is punishable as a felony of the second or third degree, if a prior conviction has been alleged for enhancement as provided by Section 12.42(a), Penal Code, or if the offense is a felony not designated as a capital felony or a felony of the first, second, or third degree and the maximum term of imprisonment that may be imposed for the offense is 60 years or less, unless the offense of which the jury has found the defendant guilty is listed in Section 3g(a)(1),

Article 42.12, of this code or the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, of this code, the court shall charge the jury in writing as follows:

"Under the law applicable in this case, the defendant, if sentenced to a term of imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.

"It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.

"Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served plus any good conduct time earned equals one-fourth of the sentence imposed. Eligibility for parole does not guarantee that parole will be granted.

"It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to a term of imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.

"You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant."

(d) This section does not permit the introduction of evidence on the operation of parole and good conduct time laws.

4. TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1) (Vernon Supp. 1997).

Sec. 2. (b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; . . .

5. TEX. CODE CRIM. PROC. ANN. art. 42.18 § 8(a), (b)(1), (b)(2) (Vernon Supp. 1993).[4]

Sec. 8. (a) A parole panel is authorized to release on parole any person confined in any penal or correctional institution who is eligible for parole under this section. A parole panel may consider a person for release on parole if the person has been sentenced to a term of imprisonment in the institutional division, is confined in a jail in this state, a federal correctional institution, or a jail or a correctional institution in another state, and is eligible for parole. A parole panel may release a person on parole during the tentative parole month established for the person if the panel determines that the person's release will not increase the likelihood of harm to the public or that the person has not failed to progress in the manner required by the panel in Subsection (e) of this section. The institutional division may provide the pardons and paroles division with sentence time credit information on persons described in this subsection and the pardons and paroles division may develop its own sentence time credit information on persons described by this subsection, but in either event, good time credit shall be calculated for a person as if the person were confined in the institutional division during the entire time the person was actually confined. The period of parole shall be equivalent to the maximum term for which the prisoner was sentenced less calendar time actually served on the sentence. Every prisoner while on parole shall remain in the legal custody of the pardons and paroles division and shall be amenable to conditions of supervision ordered under this article. All paroles shall issue upon order of a parole panel.

(b)(1) A prisoner under sentence of death is not eligible for parole.

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[4] Act of May 27, 1991, 72nd Leg., R.S., ch. 652, § 10, 1991 Tex. Sess. Law Serv. 2394, 2396.

(2) If a prisoner is serving a life sentence for a capital felony, the prisoner is not eligible for release on parole until the actual calendar time the prisoner has served, without consideration of good conduct time, equals 35 calendar years.

IV. CONCISE STATEMENT OF RELEVANT FACTS

Petitioner was charged with the offense of capital murder and the State of Texas sought the death penalty.

Petitioner sought to question the venire concerning the fact that Petitioner, if convicted of capital murder and sentenced to life in prison, would have to serve 35 years before becoming eligible for parole.

During the punishment phase of the trial, Petitioner presented testimony from Dr. Peter Lewis, a law professor who also has a doctorate degree in criminology, about a process called "maturation reformation." Maturation reformation is a well recognized process in criminology, which demonstrates that as people age, they are increasingly less likely to commit crimes of violence. Petitioner also sought to elicit testimony from Dr. Lewis that if Petitioner were sentenced to life in prison for capital murder, he would have to serve 35 years before becoming eligible for parole. After the trial court sustained the State's objection to this testimony, Petitioner made an offer of proof and bill of exceptions regarding Dr. Lewis's testimony. The relevant portion of Dr. Lewis's testimony is included in the record at R.-XL-79-85.

Finally, Petitioner sought a jury instruction worded almost identically to Article 37.07 § 4(a), TEX. CODE CRIM. PROC. ANN. art. 37.07 § 4(a) (Vernon Supp. 1993), properly applying the law of

parole to Petitioner. The requested instruction is included in the record at R.-II-523-24 and reads in full as follows:

> Under the law applicable in this case, the defendant, if sentenced to life imprisonment, may earn time off the period of incarceration imposed through the award of good conduct time. Prison authorities may award good conduct time to a prisoner who exhibits good behavior, diligence in carrying out prison work assignments, and attempts at rehabilitation. If a prisoner engages in misconduct, prison authorities may also take away all or part of any good conduct time earned by the prisoner.
>
> It is also possible that the length of time for which the defendant will be imprisoned might be reduced by the award of parole.
>
> Under the law applicable in this case, if the defendant is sentenced to life imprisonment, he will not become eligible for parole until the actual time served equals 35 years, without consideration of any good conduct time he may earn. Eligibility for parole does not guarantee that parole will be granted.
>
> It cannot accurately be predicted how the parole law and good conduct time might be applied to this defendant if he is sentenced to life imprisonment, because the application of these laws will depend on decisions made by prison and parole authorities.
>
> You may consider the existence of the parole law and good conduct time. However, you are not to consider the extent to which good conduct time may be awarded to or forfeited by this particular defendant. You are not to consider the manner in which the parole law may be applied to this particular defendant.

The trial court sustained the State's objections to each attempt to bring truthful information related to Petitioner's parole eligibility. All three rulings were presented to the Court of Criminal Appeals. The court overruled his points of error related to voir dire as follows:

> In his ninth, tenth, and eleventh points of error, appellant contends the trial court erred in not allowing him to voir dire venirepersons on his parole eligibility.

> He asserted that this violated his equal protection rights and his rights guaranteed in the due process and due course of laws provisions of the United States and Texas Constitutions. We have previously addressed these points of error and decided them adversely to appellant's position. Smith v. State, 898 S.W.2d 838 (Tex. Crim. App.), cert. denied, 116 S. Ct. 131 (1995); Broxton v. State, 909 S.W.2d 912 (Tex. Crim. App. 1995); Sonnier v. State, 913 S.W.2d 511 (Tex. Crim. App. 1995). Appellant has not persuaded us to revisit these holdings.

Brown, Slip op. at 4.

The court overruled his points of error related to Dr. Lewis's testimony and the jury instruction on parole in the following language:

> Appellant avers in his forty-sixth and forty-seventh points of error that the trial court erred in sustaining the State's objection to testimony that appellant would be required to serve a minimum of 35 years in prison before becoming eligible for parole and overruling his requested jury charge on the same topic. We have already addressed these issues on a number of occasions and held contrary to appellant's position. Appellant has given us no reason why these cases should not control in the instant case.

Brown, Slip op. at 56.

IV. REASONS FOR REVIEW

At its bottom, the instant petition presents an issue left open in Simmons v. South Carolina, ___ U.S. ___, 114 S.Ct. 2187 (1994), that is whether a jury considering whether a defendant convicted of capital murder should be sentenced to death or life in prison **with the possibility of parole** must be informed of the application of the state's parole laws as they apply to that defendant when the state must prove beyond a reasonable doubt that there is a probability that the defendant will constitute a future danger to society by committing criminal acts of violence. While

the issue is presented in terms of the Fourteenth Amendment Due Process Clause, the Fourteenth Amendment Equal Protection Clause, and the Eighth Amendment Cruel and Unusual Punishment Clause, and while each constitutional provision has separate ramifications and separate applications, each protects related but different interests.

A. Due Process: Simmons v. South Carolina

Issue One (Restated)

1. Whether the Due Process Clause of the Fourteenth Amendment, U. S. CONST. amend. XIV, requires states to instruct juries in the law of parole as it relates to persons serving life sentences for capital murder when (1) the future dangerousness of the defendant to commit crimes of violence must be found before the death penalty may be assessed;(2) the defendant is not eligible for parole until he has served 35 calendar years of the sentence; and (3) the defendant presents evidence that as a person ages he becomes likely to commit crimes of violence.

Issue Two (Restated)

2. Whether a defendant charged with a capital offense is deprived of his right to Due Process as guaranteed by the Fourteenth Amendment, U. S. CONST. amend. XIV, at the punishment state of his trial when the state trial court excludes evidence of parole eligibility when the defendant's future dangerousness is a factor that must be proven by the state and the excluded evidence is coupled with expert testimony concerning the defendant's future dangerousness.

In these issues, Petitioner seeks review of whether the rule announced by this Court in Simmons applies to states that have no provision for life without parole. Thus, review is proper pursuant to Rule 10(c) in that the Texas Court of Criminal Appeals has decided an important question of federal law that has not been, but should be, settled by the Supreme Court and has decided an

important federal question that conflicts with this Court's decision in Simmons. Alternatively, review is proper pursuant to Rule 10(b) in that the Court of Criminal Appeals has decided an important question of federal law in a way that conflicts with the Supreme Court of New Mexico in Clark v. Tansy, 118 N.M. 486, 882 P.2d 527 (1994).

In Simmons, the majority held that in capital murder trials in which the death penalty is sought, when (1) the prosecution makes the defendant's future dangerousness an issue and (2) the defendant is not eligible for parole, the defendant is entitled to inform the jury of his parole eligibility. While the plurality held that a jury instruction from the court was the appropriate vehicle to so inform the jury, the concurring Justices would have allowed the defendant to present the truthful information in some other way. While Simmons was, on its facts, limited to cases involving life without parole, the dissent recognized that the logic applies to death penalty cases involving life with the possibility of parole. As Justice Scalia wrote in dissent:

> When the prosecution has not suggested parolability, I see no more reason why the United States Constitution should compel the admission of evidence showing that, under the State's current law, the defendant would be nonparolable, than that it should compel the admission of evidence showing that parolable life-sentence murderers are in fact almost never paroled, or are paroled only after age 70; or evidence to the effect that escapes of life-without-parole inmates are rare; or evidence showing that, though under the current law, the defendant will be parolable in 20 years, the recidivism rate for elderly prisoners released after long incarceration is negligible.

___ U.S. at ___, 114 S.Ct. at 2204 (Scalia, J., dissenting).

It is now the law in Texas, and it has been the law since the current death penalty statute was adopted in 1973, that the State must prove beyond a reasonable doubt that there is a probability that the defendant will commit future crimes of violence which constitute a threat to society before a death sentence may be imposed. TEX. CODE CRIM. PROC. ANN. art. 37.071(b)(2) (Vernon 1981);[5] TEX. CODE CRIM. PROC. ANN. art. 37.071 § 2(b)(1) (Vernon Supp. 1997).[6] Thus, unlike Simmons, where the prosecutor simply argued the defendant's future dangerousness, future dangerousness in Texas is an essential finding upon which a death sentence must be based.

In Texas, where the future danger posed by the defendant is a statutory element in the capital sentencing scheme, truthful information about parole eligibility would serve the purpose of allowing the defendant to present truthful information about parole ineligibility in order to deny or explain a showing of future dangerousness. The sole difference between life with the possibility of parole and life without parole is degree. In Simmons, the defendant if sentenced to life in prison for capital murder would never be eligible for parole. In Texas, depending on the date of the offense, a defendant is statutorily ineligible for parole for a specified number of years. See generally TEX. CODE CRIM. PROC. ANN. art. 42.18 § 8(b)(s) (Vernon Supp. 1997).

In the instant case, Petitioner sought an instruction giving

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[5] Act effective June 14, 1973, 63rd Leg., R.S., ch. 426 , art. 3, § 1, 1973 Tex. Sess. Law Serv. 1125.

[6] Act of May 30, 1993, 73rd Leg., R.S., ch. 781, § 2, 1993 Tex. Sess. Law Serv. 3060.

the jury truthful information concerning the laws of parole. This was coupled with evidence from an expert that as persons -- not just murderers -- become older, they become less likely to commit violent crimes and that after a person reaches his or her late 30s or early 40s, the chances of a person committing future violent crimes is greatly reduced.[7] When the truthful information about parole ineligibility is coupled with the expert's testimony, a rational juror could consider the lengthy minimum time served before parole eligibility as evidence to "deny or explain" the State's showing of future dangerousness.[8]

However, the trial court instead gave an instruction in which it informed the jury that it should not consider parole because parole is exclusively the province of the Board of Pardons and Paroles and the governor. The instruction as given is included in the record at R.-II-519 and reads in full as follows:

> During your deliberations, you are not to consider or discuss any possible action of the Board of Pardons and Paroles division of the Texas Department of Criminal Justice or of the Governor or how long the defendant would be required to serve to satisfy a sentence of life

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[7] Because a person may not be sentenced to death in Texas unless he was 17 at the time of the offense, under current Texas law, a capital murder defendant sentenced to life rather than death must be at least 57 years old before becoming eligible for parole. See TEX. CODE CRIM. PROC. ANN. art. 42.18 § 8(b)(2) (Vernon Supp. 1997). At the time of Petitioner's trial, the minimum age was 52. See TEX. CODE CRIM. PROC. ANN. art. 42.18 § 8(b)(2) (Vernon Supp. 1993).

[8] The State, of course, could argue that a defendant would be dangerous in prison. Simmons, ___ U.S. at ___, 114 S. Ct. at 2201 (O'Connor, J., concurring), something the Court of Criminal Appeals has approved because the court allows jurors to consider "society" to include the prison population. Sterling v. State, 830 S.W.2d 114 (Tex. Crim. App. 1992).

imprisonment.

Petitioner asserts that the instruction in the instant case was constitutionally less acceptable than the instruction in Simmons that a life sentence has its "pla[i]n and ordinary meaning." Simmons, ___ U.S. at ___, 114 S.Ct. at 2192. The charge in Simmons at least can be read as informing the jury that life equals life. The instruction in the instant case essentially told the jury that parole is a possibility, while keeping truthful information about the parole laws from the jury and failing to give accurate information usable by the jury to determine future dangerousness.

Petitioner believes that this Court should grant certiorari to determine whether the rule of Simmons applies to capital murder cases in which the possible sentences are death or life with the possibility of parole when the defendant's future dangerousness is an issue. A jury given truthful information concerning the parole laws can take those laws into consideration in reaching a conclusion on the probability that the defendant will commit future crimes of violence which constitute a danger to society. While the weight to be given that information is within the discretion of the jury, the information is clearly relevant to the jury's decision on that issue.

Furthermore, while New Mexico has applied Simmons to cases in which the choices are death and life with the possibility of parole, see Clark v. Tansy, 118 N.M. 486, 882 P.2d 527 (1994), Texas and the Fifth Circuit consistently have read Simmons narrowly as applying only to cases involving life without parole as the

alternative to the death penalty, see, e.g., Smith v. State, 898 S.W.2d 838 (Tex. Crim. App.), cert. denied, ___ U.S. ___, 116 S.Ct. 131 (1995); Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994), cert. denied, ___ U.S. ___, 115 S.Ct. 1959 (1995). Thus, there is a split in applying Simmons, and this Court should grant certiorari to settle the issue.

B. Equal Protection

Issue Three (Restated)

3. Whether the Equal Protection Clause of the Fourteenth Amendment, U. S. CONST. amend. XIV, requires states to instruct juries in the law of parole in capital murder cases in which the state is seeking the death penalty when the state's statutes require that juries be instructed in the law of parole in all other felony cases in which the jury assesses punishment?

In this issue, Petitioner asserts that he is deprived of Equal Protection as guaranteed by the Fourteenth Amendment of the United States Constitution in that Texas law requires that juries imposing sentence in non-death penalty cases be informed of the parole laws while it is forbidden to inform juries in death penalty cases of the parole laws. Thus, Petitioner asserts that the state of Texas draws an unconstitutional and irrational distinction between defendants charged with capital felonies and those charged with all other felonies.

Review is proper pursuant to Rule 10(c) in that this is an important question of federal law that has not been, but should be, determined by this Court.

Since the 1980s, Texas has sought to inform juries in non-capital cases of the existence and provisions of parole laws. See

TEX. CODE CRIM. PROC. ANN. art. 37.07 § 4 (Vernon Supp. 1997). The Texas Court of Criminal Appeals held that the first attempt was unconstitutional as a violation of the due course of law provisions of the Texas Constitution, TEX. CONST. art. I, § 19. Rose v. State, 752 S.W.2d 529 (Tex. Crim. App. 1987). In the wake of Rose, the Texas Constitution was amended to authorize the Legislature to prescribe jury instructions related to parole.[9]

This issue was presented to the Court of Criminal Appeals in Smith v. State, 898 S.W.2d 838 (Tex. Crim. App.), cert. denied, _ U.S. ___, 116 S. Ct. 131 (1995).[10] In Smith, the court held that there was no violation of the Equal Protection Clause in that defendants in capital cases constitute one class and those charged with all other felonies constitute a separate class. Id. at 847-48.

Petitioner asserts that such a classification is irrational. Juries should either be given truthful information concerning parole eligibility when they assess sentences in felony cases or they should not. Further, Petitioner asserts that the classification system adopted by Texas has the effect of increasing

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[9] The proposed instruction requested by Petitioner in the instant case was based on Article 37.07 § 4 of the Texas Code of Criminal Procedure. The instruction that was given is the traditional instruction given prior to the adoption of Article 37.07 § 4 by Act of May 25, 1985, 69th Leg., R.S., ch. 576, 1985 Tex. Sess. Law Serv. 4446 (codified at TEX. CODE CRIM. PROC. ANN. art. 37.07 (Vernon 1981).

[10] In Smith, the defendant would have been eligible for parole after serving 15 years. Subsequently, the statute was amended to require that Petitioner serve 35 years before parole eligibility. It has since been amended again to require 40 years incarceration prior to parole eligibility.

the likelihood that a jury will assess a significant punishment in a non-capital felony by informing the jury of the earliest date when a defendant becomes legally eligible for parole, while at the same time (1) indirectly informing the jury of the possibility of parole for capital murder defendants sentenced to life and (2) withholding truthful information concerning the application of the parole laws.

Petitioner asserts that this Court should grant certiorari to determine whether the Equal Protection Clause requires the states to treat all felony defendants alike in informing sentencing juries of the effects and existence of parole laws.

C. Cruel and Unusual Punishment

Issue Four (Restated)

4. Whether the Cruel and Unusual Punishment Clause of the Eighth Amendment, U. S. CONST. amend. VIII, requires states to instruct juries in the law of parole as it relates to persons serving life sentences for capital murder when 1) the future dangerousness of the defendant to commit crimes of violence must be found before the death penalty may be assessed; 2) the defendant is not eligible for parole until he has served 35 calendar years of the sentence; and 3) the defendant presents evidence that as a person ages he becomes likely to commit crimes of violence?

Issue Five (Restated)

5. Whether a defendant's right against cruel and unusual punishment as guaranteed by the Eighth Amendment, U. S. CONST. amend. VIII, is violated when the state trial court excludes evidence of parole eligibility when the defendant's future dangerousness is a factor that must be proven by the state and the excluded evidence is coupled with expert testimony concerning the defendant's future dangerousness.

Petitioner asserts that review is proper pursuant to Rule 10(c) in that these are important questions of federal law that

have been decided in conflict with this Court's decisions in Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion)

Although the Court's decision in Simmons relied on the Due Process Clause of the Fourteenth Amendment, at least two Justices, Justices Souter and Stevens, also would have based the decision on the alternative grounds of the Eighth Amendment Cruel and Unusual Punishment Clause. The concurring Justices would have held that the heightened reliability requirement of the Eighth Amendment in death penalty cases "also mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider, in making the reasoned moral choice between sentencing alternatives." Simmons, ___ U.S. at ___, 114 S.Ct. at 2198 (Souter, J., concurring).

In a series of cases such as Eddings and Lockett, involving the application of the Eighth Amendment Cruel and Unusual Punishment Clause to the death penalty, this Court has required that in death penalty cases, all relevant mitigating evidence be admissible. The Court has further held that the jury must have a vehicle by which to apply that mitigating evidence. Penry v. Lynaugh, 492 U.S. 203 (1989).

Petitioner asserts that when the defendant's future dangerousness is an issue in deciding whether he should be sentenced to death, the Eighth Amendment allows him to introduce evidence both that he will not constitute a future danger to

society due to his long incarceration prior to parole eligibility and the earliest time when he becomes eligible for parole. Such evidence is mitigating in terms of Eddings and Lockett in that it constitutes significant evidence that the defendant will not constitute a continuing threat to society by committing crimes of violence in the future. While the jury is the sole judge of the weight to be given to the evidence, the evidence is relevant and mitigating in that it has the potential to reduce the chance of the imposition of the death penalty.

For these reasons and the reasons set out in Justice Souter's concurring opinion in Simmons, this Court should grant certiorari.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays that this Court grant his petition for writ of certiorari, order full briefs and oral arguments, reverse the decision of the Court of Criminal Appeals, and vacate his death sentence.

Respectfully submitted,

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96-9187

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document has been served by sending it certified mail, return receipt requested to each of the below listed persons on this 27th day of May, 1997.

Tom Moran

Harris County District Attorney's Office
ATTN: Appellate Division
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Houston, Texas 77002

The Hon. Dan Morales
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APPENDIX

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A. Court of Criminal Appeals Opinion. (December 18, 1996) A-1

B. Court of Criminal Appeals denial of petition for discretionary review. (February 26, 1997) B-1

APPENDIX A

ARTHUR BROWN, JR., Appellant

NO. 71,817 v. - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

O P I N I O N

Appellant, Arthur Brown, Jr., was convicted in November 1993 of a capital murder committed in June 1992. TEX. PENAL CODE ANN. §19.03(a)(6). Pursuant to the jury's answers to the special issues set forth in Tex. Code Crim. Proc. Ann. art. 37.071, §§ 2(b) and 2(e), the trial judge sentenced appellant to death. Tex. Code Crim. Proc. Ann. art. 37.071, § 2(g). Direct appeal is automatic. Id. at § 2(h). We will affirm.

Appellant raises forty-seven points of error. He does not challenge the sufficiency of the evidence at either stage of trial. Therefore we will dispense with a recitation of the facts except those necessary to address appellant's points of error. We will address the points of error approximately in the order they are presented to us.

Appellant contends in his first point of error that the trial court erred in not granting his request for a court reporter to record the voir dire of the central jury panel.[1] We have already addressed this point adversely to appellant in Chambers v. State, 903 S.W.2d 21, 31 (Tex. Crim. App. 1995) and appellant has given us no reason to revisit the issue. Point of error one is overruled.

In his second point of error, appellant alleges that the trial court erred in overruling Appellant's motion pursuant to Tex. Code Crim. Proc. Ann. art. 35.11 (Vernon Supp. 1995)[2] to randomly select

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[1] A special venire was not requested in this case. Rather, the jury panel was drawn from the central jury or "general" assembly.

[2] While appellant technically should be citing to the 1991 version of Article 35.11, the 1995 version is worded the same as the 1991 version which was in effect at appellant's trial. The article reads:

> The trial judge, on the demand of the defendant or his attorney, or of the State's counsel, shall cause a sufficient number of jurors from which a jury may be selected to try the case to be randomly selected from the members of the general panel drawn or assigned as jurors in the case. The clerk shall randomly select the jurors by a computer or

jurors from the members of the general jury pool. In essence, appellant here argues that pursuant to article 35.11, the entire General Assembly panel should have been shuffled.[3] From that umbrella group, a smaller general panel, from which a jury could be chosen to try appellant's case, could then be selected and sent to the courtroom in which appellant's cause was being tried. The trial court overruled this request.[4]

The trial court did not err in this regard. In Rector v. State, 738 S.W.2d 235, 249 (Tex. Crim. App. 1986), cert. denied, 484 U.S. 872 (1987), we noted that article 35.11 applies only to the panel drawn for a particular case. See Williams v. State, 719 S.W.2d 573, 575 (Tex. Crim. App. 1986); Latham v. State, 656 S.W.2d 478, 480 (Tex. Crim. App. 1983) (the accused is not entitled to have a shuffle of all of the names of the persons summoned for jury service during the week of his trial).[5] Appellant's request in the instant case would have veniremembers shuffled that would never be assigned to his panel. Article 35.11 does not grant this right. Rector, supra. Point of error two is overruled.

In points of error three through eight, appellant claims the trial court should have quashed or struck the jury panels selected from the general assembly on the ground that the trial judge in the instant cause did not personally determine the exemptions, excuses, and disqualifications of those initially summoned from the central

---

> other process of random selection and shall write or print the names, in the order selected, on the jury list from which the jury is to be selected to try the case. The clerk shall deliver a copy of the list to the State's counsel and to the defendant or his attorney.

[3] According to the record, this number consisted of approximately 2100 individuals.

[4] It should be noted that the trial judge granted appellant's request as far as it pertained to the smaller panel sent to his courtroom, but denied it only insofar as it requested a shuffle of the 1550 - 2100 persons called for the General Assembly.

[5] While these cases dealt with an early version of Article 35.11, the language upon which their holdings were based remains in the statute, thus the same analysis may be applied. The pertinent language consists of the phrase, "the members of the general panel drawn or assigned as jurors in the case." (emphasis added).

jury room. Appellant alleges that this was in violation of Tex. Code Crim. Proc. Ann. art. 35.03, § 2 and Texas Government Code §62.016(j). Alternatively, appellant asserts that the exempted, excused or disqualified veniremembers should have been attached by the trial court and brought back to determine whether the central jury judge or his designee appropriately dismissed them from the panel.[6] The trial judge in the instant cause overruled all of these requests.

Potential jurors summoned to the central jury room, as was done in the instant case, are not yet assigned to a case and, in fact, have no way of knowing whether they will be assigned to a capital or noncapital case. Hence, it was appropriate for the central jury court or that court's designee to determine the validity of the excuses of potential jurors. We have construed the language of article 35.03, § 2 and Texas Government Code 62.016(j) prohibiting a "court's designee" from hearing and determining excuses as referring to the distinction between a "special venire" specifically called in a capital case and the formation of panels drawn through a general assembly. Chambers, 903 S.W.2d at 30. In other words, had this case utilized a special venire, then the trial judge conducting the case would have been required to hear all excuses and could not have designated others to do so in his stead. However, a special venire was not the vehicle used in the instant case. The potential jurors who were granted excuses by someone other than the judge in the instant case were general assembly members and were not yet assigned to appellant's or any other case. Hence, the trial judge in the instant case did not err in overruling appellant's motions to quash or strike the panels. Nor did the judge err in failing to attach those members excused from the central jury panel. **Points of error three through eight are overruled.**

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[6] We initially note that neither article 35.03 nor Texas Government Code 62.016 discuss the propriety of who is allowed to hear and determine exemptions and disqualifications of potential jurors. Therefore, appellant's contentions as to these areas are overruled as inadequately briefed. Tex. R. App. Proc. 74(f).

In his ninth, tenth, and eleventh points of error, appellant contends the trial court erred in not allowing him to voir dire venirepersons on his parole eligibility. He asserted that this violated his equal protection rights and his rights guaranteed in the due process and due course of law provisions in the United States and Texas Constitutions. We have previously addressed these points of error and decided them adversely to appellant's position. Smith v. State, 898 S.W.2d 838 (Tex. Crim. App.), cert. denied, 116 S.Ct. 131 (1995); Broxton v. State, 909 S.W.2d 912 (Tex. Crim. App. 1995); Sonnier v. State, 913 S.W.2d 511 (Tex. Crim. App. 1995). Appellant has not persuaded us to revisit these holdings. Points of error nine, ten, and eleven are overruled.

In related point of error twelve, appellant contends that the trial court erred in overruling his objection to the State's voir dire of D. Soles. Specifically, he claims that the State improperly injected the issue of parole into its questioning of the venireperson in violation of the trial court's prohibition against the subject. The complained-of portion of voir dire occurred as the State was discussing the special issues with the venireperson and read as follows:

> [THE STATE:] And I think kind of the reason that we have these issues is because you're trying to decide if this is a person who, based on their actions, deserves the death penalty or deserves life in prison. Okay?
>
> So you want to decide if this guy is going to continue to commit violent acts -- that sort of makes sense, you know -- and not going to continue to commit violent acts, then put him in prison for the rest of his life and let him stay there and pay the price for his crime. But we don't want anybody to continue to be violent in prison or continue to be violent if ever released to be a threat to society.
>
> [APPELLANT:] Your Honor, we object to that last statement about continue about [sic] to be released if ever released. We object to that because that's a comment on parole which the Court has forbid both sides to discuss.
>
> THE COURT: In that context, the objection is overruled.

Unlike appellant, we do not conclude that the State's reference to a "release" necessarily encompasses a reference to

parole. Given this, we cannot say that the trial court abused its discretion in overruling appellant's objection. Point of error twelve is overruled.

Appellant complains in his thirteenth point of error that the trial court erred in sustaining the State's objection to his voir dire of W. Davis concerning whether the venireperson's answer to the second special issue on punishment[1] would be automatic if appellant was convicted of capital murder as a party. In other words, he argues that he was denied the asking of a proper question which prevented him from intelligently exercising his peremptory strikes. The particular colloquy of which appellant complains is as follows:

> [APPELLANT:] Now, if you already found at the guilt and innocence phase that he intended to promote, assist, aid or encourage or solicit, whatever, would you automatically answer Issue No. 2 [on parties] yes just based on what you heard at the guilt and innocence phase?
>
> [VENIREPERSON:] I'm not sure how you could answer the question no.
>
> [APPELLANT:] Can you ever imagine a situation where you would answer it no having found that he intended to assist the other person, commit the capital murder?
>
> [THE STATE:] Well, Your Honor, I object at this point, going one step further asking the juror to commit by putting in because.
>
> THE COURT: Elaborate for me.
>
> [THE STATE:] She's asking him if you found that he intended to do this intentionally or knowingly and I think that by asking that question or asking the juror to commit and you found him guilty of intending now are you going to find this because obviously intended in Issue No. 2.
>
> THE COURT: Okay. To that extent the way the question is framed that it appears to call for

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[1] The second special issue is set out in Article 37.071, § 2(b)(2) and reads as follows:

> (2) in cases in which the jury charge at the guilt or innocence stage permitted the jury to find the defendant guilty as a party under Sections 7.01 and 7.02, Penal Code, whether the defendant actually caused the death of the deceased or did not actually cause the death of the deceased but intended to kill the deceased or another or anticipated that a human life would be taken.

> commitment to that extent, the objection's sustained.
>
> * * *
>
> [APPELLANT:] Let me try again as confusing as these questions are. It's also confusing for me to ask questions of you about those confusing questions. What I want to know is if you have someone who you determined that they either intentionally or knowingly, either way, caused the death of two or more individuals, what I'm -- I'm sorry -- more than one individual and that the person was not the shooter but that the person acting with the intent to promote or assist the commission of the capital murder, that person solicited, encouraged, directed, aided or attempted to aid the other person commit the offense. Is there any way that having found that you could answer Issue No. 2 no?
>
> [THE STATE:] Judge, once again I'm objection [sic] to committing him to a particular answer.
>
> THE COURT: Objection sustained.

When reviewing on appeal whether or not an appellant was improperly restricted on voir dire, we look to whether the trial judge abused his discretion in making his rulings. Nunfio v. State, 808 S.W.2d 482 (Tex. Crim. App. 1991). However, a trial court does not abuse its discretion when it sustains an objection to a question that was improper in form, but does not restrict the rephrasing of that question in a proper manner. Guerra v. State, 771 S.W.2d 453, 472 (Tex. Crim. App. 1988), cert. denied, 492 U.S. 925 (1989). Appellant complains that he was not allowed to ask Davis if his answer to the second special issue "would be automatic" if the defendant was convicted as a party to capital murder. However, the first question recited above is precisely that question. Furthermore, appellant later asked:

> [APPELLANT:] If you consider Issue No. 2 and understanding that it's a party situation where you have found someone guilty of acting of either intentionally or knowingly killing more than one person and that if it was a specific intent to help them do that, how do you feel about the factors or whatever would come into consideration as to Issue No. 2?
>
> [VENIREPERSON:] I'm not sure what circumstances would make me answer the question no.

Given that the trial court sustained the State's objections "to the way the question [was] framed" and given that appellant was allowed to ask substantially the same question without objection elsewhere,

we hold that the trial judge did not abuse his discretion in sustaining the State's objections. Etheridge v. State, 903 S.W.2d 1, 9 (Tex. Crim. App. 1994), cert. denied, 116 S.Ct. 314 (1995); Black v. State, 816 S.W.2d 350, 360 (Tex. Crim. App. 1991); Guerra, supra. **Point of error thirteen is overruled.**

In point fourteen, appellant likewise argues that the trial court erred in sustaining the State's objection to a question to a veniremember concerning whether a guilty verdict would always lead to an affirmative answer to the second special issue. Again, appellant asserts that the denial of this proper question prevented him from intelligently exercising his peremptory strikes. During appellant's examination of M. Brandon over the punishment special issues, the veniremember noted that the issue of parties' liability for guilt and the parties question at punishment were "very similar." In response to this statement, the following occurred:

> [APPELLANT:] Are they seminar [sic] enough that the answer to one always leads directly to the answer to the other one?
>
> [THE STATE:] Judge, I object. I think that's asking the jury to commit.
>
> THE COURT: Because it does what?
>
> [THE STATE:] Commits to a specific answer.
>
> THE COURT: Okay. It almost sounded like that [appellant]. He's basically stated that appears to be similar.
>
> [APPELLANT:] Your Honor, I'm trying to follow up. Similar that the answer to one always leads directly to the answer to the other.
>
> THE COURT: Objection sustained.

However, the record also reveals that appellant was allowed to later ask and have answered the following question:

> [APPELLANT:] Can you conceive of any set of circumstances and I don't want to know what it is where having found a person guilty of capital murder beyond a reasonable doubt without me putting on evidence at all at the guilt or at the punishment stage with nothing more than finding someone guilty beyond a reasonable doubt of capital murder.
>
> Can you conceive of any set of circumstances where you would find a no to Issue No. 2 [on parties]?

Hence, as in the situation above concerning venireperson Davis,

because the trial judge did not restrict the later rephrasing of the question, he cannot be said to have abused his discretion in sustaining the State's objections. Etheridge, supra; Black, supra; Guerra, supra. **Point of error fourteen is overruled.**

Points of error fifteen, sixteen, and seventeen all pertain to the questioning of C. Lauritzen. Specifically, appellant complains that the trial court erred in sustaining three of the State's questions to the veniremember: one, whether Lauritzen would lean toward the death penalty or a life sentence; two, whether it would make a difference in sentencing if Lauritzen knew appellant would be incarcerated for a long period of time; and three, whether Lauritzen could envision a situation other than a mercy killing in which he could consider the minimum five year sentence.

In the first instance, the complained-of exchange went as follows:

> [APPELLANT:] If you were to find someone guilty of capital murder would you lean towards giving him the death penalty or lean towards life?
>
> [VENIREMEMBER:] Me, personally?
>
> [THE STATE:] I object. I believe that's improper questions [sic]. Trying to commit the juror.
>
> THE COURT: Sustained. Rephrase, please.

While the trial judge did sustain the State's objection, the fact that he also told appellant to rephrase his question indicates that he was not intending to restrict appellant's voir dire as to the subject matter involved, only as to the form of the question in which the matter was presented. In fact, appellant ultimately did ask the desired question. Hence, the trial judge did not abuse his discretion. Etheridge, supra; Black, supra; Guerra, supra. **Point of error fifteen is overruled.**

In the second instance, appellant complains that the court improperly restricted his voir dire by sustaining the State's objections to questions like, "How do you feel about keeping someone in prison for 30 or 35 years?" and "Would that help you in making your decision of life versus death if you knew that if you chose life that [appellant] would be incarcerated for a long period

of time?" The State objected to the form of the question and the trial court sustained the objection. However, notwithstanding this, appellant was apparently attempting to voir dire the veniremember concerning the present parole laws, a subject we have previously held to be a improper area of inquiry. See points of error nine, ten, and eleven, supra; Smith, supra; Broxton, supra; Sonnier, supra. Because the subject was not a proper area of inquiry, the trial judge did not abuse his discretion in sustaining the State's objection. Dinkins v. State, 894 S.W.2d 330, 345 (Tex. Crim. App. 1995), cert. denied, 116 S.Ct. 106 (1995). Point of error sixteen is overruled.

Finally, appellant alleges that the following was an improper restriction on his voir dire of Lauritzen:

> [APPELLANT:] Now, you told the prosecutor that you could consider the full range of punishment on the lesser offense of murder, but my other example that I gave you of a mercy killing where someone is saying I'm in terrible pain or, you know, I'll never be able to walk again and I'm in terrible pain, please pull the plug.
>
> Other than the mercy killing, if someone intentionally or knowingly causes the death of another individual or if they intend to cause the death and do an act clearly dangerous to human life, can you imagine any case where you can consider the minimum of five years other than somebody saying, "Pull the plug, please"?
>
> [THE STATE:] Well, Judge, I object. No requirement that this juror be able to come up or to conjure up a case in his mind where five years would be appropriate.
>
> THE COURT: What would be the objection?
>
> [THE STATE:] Improper, also an attempt to commit the juror to a certain set of facts.
>
> THE COURT: Sustain on the second part.

Following this exchange, the parties and the trial court had a discussion of the law outside the hearing of the veniremember which revealed the following comments:

> THE COURT: The objection is sustained as to what form, I can't remember what your objection was.
>
> [THE STATE:] I think it was on requiring a commitment to a specific set of facts because I also objected to the improper question.
>
> * * *

> THE COURT: The record speaks for itself. Aldridge is also helpful. It tells us to look at the totality of the voir dire, the totality of the individual's responses and under the circumstances here the State's objection is sustained. And you can ask other types of questions.
>
> * * *
>
> [APPELLANT:] Am I going to be allowed to ask him about it?
>
> THE COURT: In the appropriate fashion just bring him in.
>
> [APPELLANT:] I'm not sure what question is -- is that y'all want me to ask?
>
> * * *
>
> THE COURT: Okay. You can go ahead and ask any questions that's not objectionable.

Ultimately, the juror was able to say that he could consider the minimum punishment of five years.

It is clear from the totality of Lauritzen's voir dire that the trial judge again sustained the State's objection to the form of appellant's question, but did not prohibit him from inquiring into the subject matter with properly phrased questions. Given this, we hold that the trial judge did not prevent appellant from asking a proper voir dire question. Etheridge, supra; Black, supra; Guerra, supra. Point of error seventeen is overruled.

Appellant asserts in his eighteenth point of error that the trial court erred in sustaining the State's objection to his question to veniremember E. Collins as to whether the veniremember could conceive of a situation in which a life sentence for multiple murder would be appropriate. Appellant claims that this prevented him from asking a proper question. The discourse about which appellant complains consists of the following:

> [APPELLANT:] Can you think of any case where more than one person was killed where death would not be appropriate?
>
> [VENIREMEMBER:] I don't know.
>
> [THE STATE:] I object because that's asking the juror to commit to a certain set of facts.
>
> [APPELLANT:] He already answered the question.
>
> THE COURT: She may have still an objection on the line of questioning.
>
> * * *
>
> Bottom line is that the objection is sustainable and there's a question before -- in the record. So from there on proceed

> forward and accompany questions that might seek to commit or draw examples where a venire person would vote one way or the other.
>
> [APPELLANT:] Let me phrase it this way and see if I can get past the objection. Can you conceive of a situation where, if you have a multiple murder, having found someone guilty, that the minimum punishment which in a capital murder case is life would be appropriate?
>
> [THE STATE:] Judge, I'm going to object to the form of the question that it doesn't encompass these questions. Because a juror obviously isn't asked to write yes.
>
> THE COURT: Sustained.

Appellant then asked the question phrased in the context of the special issues, which question was allowed. As in previous points of error, the trial judge sustained the State's objection as to the form of appellant's question. However, the judge did not prohibit appellant from re-phrasing his questions concerning any particular area of inquiry. As such, we cannot say that the judge prevented appellant from asking a proper question. Etheridge, supra; Black, supra; Guerra, supra. Point of error eighteen is overruled.

Points of error nineteen, twenty-one, and twenty-two all concern the voir dire of M. Franklin on the presumption of innocence. Specifically, appellant avers that the trial court erred in overruling his objection to the prosecutor's statement to the veniremember that a juror could decide that the presumption of innocence no longer applies after the first witness testifies; that the court erred in refusing his request that Franklin be instructed in the correct law; and that it erred in improperly instructing the venireperson on the appropriate law.

The record reveals the following discourse which took place in front of the veniremember:

> [THE STATE:] I'm probably going to repeat some things the Judge said yesterday because I was looking at your juror sheets. Basically -- obviously, when you first start the trial, the defendant is presumed to be innocent until the State proves beyond a reasonable doubt that he's guilty of committing the offense that he's charged with. You can decide that after hearing from the first witness.
>
> [APPELLANT:] Objection. Understatement [sic] of law.
>
> THE COURT: With regards?

[APPELLANT:] With regard to presumption of innocence. The law is the presumption of innocence goes with the defendant in the jury room.

THE COURT: The presumption of innocence is what the defendant starts with and you're saying throughout the trial he keeps that?

[APPELLANT:] Your Honor, it stays with the defendant throughout the trial and goes with him into the jury room, and it does not end when the first witness testifies even if the presumption of innocence is included in the charge, and it goes with him into the jury room.

THE COURT: Okay. You have case law on that?

[APPELLANT:] I don't have any with me.

THE COURT: Do you have case law that you know of?

[APPELLANT:] I believe I've read cases, both 5th Circuit and Court of Criminal Appeals cases.

[THE STATE:] I disagree. It's the individual juror. Even if they hear evidence from a witness who testifies and they believe that witness, they can make a decision at this point during the trial that the defendant is guilty in their own mind.

THE COURT: The important thing is it's impossible to sustain that objection in my opinion, Mr. Moran, as far as the individual's concerned. Collectively, the jury cannot during the time you're hearing the case start passing back and forth what each of you might think. You're instructed by the Judge not to say anything about your thoughts or your impressions on the evidence, about the credibility of witnesses, that everybody retain that. Once you get into the jury room until -- that part of Mr. Moran's objection, perhaps, if it's directed in that area, is correct, that it's not until you get in the jury room that the parties begin or the jurors begin to debate or discuss what the impressions might be on the evidence. So up until that point, the question as to which way the jury might be going, whether it's leaning away -- going away from the presumption of innocence, that's the way the others begin to lean because that's the first time you get to discuss it. The objection is overruled.

After the trial court overruled the objection, the venireperson was excused from the room at appellant's request. Appellant challenged Franklin for cause, which the trial court denied, and the discussion continued.

Section 2.01 of the Texas Penal Code states in pertinent part that:

> All persons are presumed to be innocent and no person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt.

In Geesa v. State, 820 S.W.2d 154, 162 (Tex. Crim. App. 1991), we held that a "reasonable doubt" instruction must be submitted to the jury in all criminal cases which includes the language:

> The presumption of innocence alone is sufficient to acquit the defendant, unless the jurors are satisfied beyond a reasonable doubt of the defendant's guilt after careful and impartial consideration of all the evidence in the case.

(emphasis added) Hence, while a juror may hear persuasive evidence from the first witness, that juror may not conclude that the presumption of innocence has been overcome until he or she has heard all of the evidence and given it fair and thorough consideration. Furthermore, in considering the presumption of innocence, the United States Supreme Court has noted that, "Once a defendant has been afforded a fair trial and convicted of the offense for which he was charged, the presumption of innocence disappears." Herrera v. Collins, 113 S.Ct. 853, 860 (1993).

Thus, the trial court did err in overruling appellant's objection. However, the record reveals that, eventually, the following also transpired:

> (Outside the presence of the venireperson.)
>
> THE COURT: What is the question that started this?
>
> [THE STATE:] Well, he objected to my saying that, you know, this is what your focus is and you can -- you know, he's presumed innocent. You may decide after the first witness that he is not innocent and then he objected, and I didn't get to finish the rest of my statement to him.
>
> THE COURT: To the specific form of the question, for the record, I'll sustain that and you go ahead and elaborate a little bit on that.
>
> * * *
>
> [APPELLANT:] On my request for instruction, I take it the Court's going to overrule the request?
>
> THE COURT: I will visit a little bit with [the venireperson] and then you wanted to remind him on the presumption number two.

[APPELLANT:] Of course, my question is presumption goes into the jury room with the defendant -- with the jury. Not with the defendant, obviously.

THE COURT: Okay. We go can [sic] ahead and bring [the venireperson] on in and continue, and we'll do something along those lines just as the general charge on the law.

(Whereupon Prospective Juror Franklin returned to the courtroom.)

THE COURT: Continuing with Mr. Franklin.

Mr. Franklin, we need to have some discussions on the law and sometimes it has to be held outside the presence of the venire person. I just wanted to state some position on the law. I told the group that you were in the other day that a person is presumed to be innocent until such time as the State is able to prove each and every element beyond a reasonable doubt of the accusation, the indictment. That presumption of innocence basically continues.

In the individual juror's mind there may be some personal satisfaction but still going into the jury room. That's the time. Right before then is when I read you the law that applies. While somebody may have some certain impressions, the law that is given to you at that time hopefully will be a guidance and hopefully will help in applying that evidence that was heard to the law to determine whether or not under the law a person should be found guilty or should be -- or the presumption of innocence should remain there.

In other words, that the State has not proved beyond a reasonable doubt that the person is guilty. So to an extent, Mr. Moran's earlier objection, I believe he may have stated in your presence, has some correctness to it, but at the same time I have to deal with the realities that what you hear may, in fact, be impressive upon you to a certain extent. But, yet, you've received the instructions not to share what you're thinking with anybody else. So nobody else knows what M. W. Franklin is thinking to the point that you are all given the law and all of you hear the eloquent argument of the lawyers and sometimes the lawyers' arguments help in guiding the jurors a certain way. But it's at that point that you then start to get to sharing with others what your particular thoughts might be.

So obviously one's mind -- one might already be thinking, well, no, from the evidence I think he's guilty. However, then you might hear the charge on the law and see how the evidence has been applied and you might say, no, following the legal instructions I find the defendant -- maybe I'll go not guilty based on the evidence because the presumption of innocence has not been overcome by the State through proof

> beyond a reasonable doubt. So there's all sorts of different things that may occur. So while --
>
> To a great extent, Ms. Brown is correct in the original part of her earlier statement that was a considered concern to the defense, and, yet, they're quite correct in the fact that the presumption of innocence continues until such time as all the law and all the evidence is properly before you. So -- but, yet, in your mind there may be some questions as to whether or not the State has begun to chip away or, in fact, at least a certain point convinced you individually that the individual is guilty.
>
> I'm just dealing here not with law but with the realities of the situation. Ultimately when you get the jury charge from the Court, that's the law. The law you receive at that time is what's going to govern you, and no matter what impressions one side or the other may have made on you during the evidence portion of the trial, the important thing is your ability to follow whatever law I give you and apply all the evidence picked up. And you in all probability can do that?
>
> [VENIREPERSON:] Yes, sir.
>
> THE COURT: All those different things I threw out at you?
>
> [VENIREPERSON:] Yes. I understand.

(emphasis added). Although the trial judge added a great deal of superfluous comments, he emphasized the proper law to the venireperson that the presumption of innocence continues until all of the evidence has been heard. Therefore, we conclude that any harm that may have resulted from the trial judge's initial overruling of appellant's objection was subsequently cured by this later explanation. Geesa, supra; Herrera, supra. **Points of error nineteen, twenty-one, and twenty-two are overruled.**

In related point of error twenty, appellant complains that the trial court overruled his challenge for cause to veniremember Franklin based on his understanding of the presumption of innocence. For the same reasons that we overruled points of error nineteen, twenty-one, and twenty-two, **point of error twenty is overruled.**

Appellant asserts in points of error twenty-three, twenty-four, twenty-six, and twenty-seven that the trial court erred in overruling his challenges for cause to various veniremembers. The

grant or denial of a challenge for cause is within the discretion of the trial court, and this Court will not disturb the ruling absent an abuse of the trial court's discretion. Adanandus v. State, 866 S.W.2d 210, 222 (Tex. Crim. App. 1993), cert. denied, 114 S.Ct. 1338 (1994). If a venireperson ultimately indicates that he can follow the court's instructions and render a verdict according to the evidence, that venireperson is not challengeable for cause. Id. When the trial court errs in overruling such a challenge against a venireperson, the defendant is harmed only if he uses a peremptory strike to remove the venireperson and thereafter suffers a detriment from the loss of the strike. Demouchette v. State, 731 S.W.2d 75, 83 (Tex. Crim. App. 1986), cert. denied, 482 U.S. 920 (1987). Error is preserved for review by this Court only if appellant (1) used all of his peremptory strikes, (2) asked for and was refused additional peremptory strikes, and (3) was then forced to take an identified objectionable juror whom appellant would not otherwise have accepted had the trial court granted his challenge for cause (or granted him additional peremptory strikes so that he might strike the juror). Coble v. State, 871 S.W.2d 192, 200 (Tex. Crim. App. 1993), cert. denied, 115 S.Ct. 101 (1994).

The record reflects that appellant used his fifteenth peremptory strike shortly after the tenth juror was seated. Appellant then requested and received two additional peremptory strikes with which he struck two more venirepersons. He then requested yet another peremptory strike with which he would have struck a third, but the trial court denied his request and the eleventh juror was seated. Appellant claimed this juror was objectionable.[6] Hence, appellant has preserved these issues for our review. Because appellant was granted two additional peremptory strikes, he did not suffer the loss of two strikes. Therefore, for appellant to demonstrate harm and, hence, reversible error, he must show that challenges for cause on at least three

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[6] At trial, appellant stated this juror was "unacceptable." We will accept this to mean that the juror was "objectionable."

different veniremembers were erroneously denied. Martinez v. State, 763 S.W.2d 413, 425 (Tex. Crim. App. 1988), cert. denied, 114 S.Ct. 2765 (1994); Henley v. State, 644 S.W.2d 950 (Tex. App.--Corpus Christi 1982, pet. ref'd). In other words, if the challenges for cause to two of the venirepersons were properly overruled by the trial court, then appellant cannot demonstrate harm on appeal. With this in mind, we turn to the first complained-of challenge.

Appellant avers in point of error twenty-three that the trial court erred in overruling his challenge for cause to venireperson W. Davis. Specifically, appellant complains that his challenge for cause should have been granted due to the venireperson's statement that he would always answer the second special issue affirmatively if he convicted appellant as a party to capital murder. However, the record does not support appellant's contention. In addition to the specific facts set out previously in point of error thirteen, the record reveals the following exchanges:

> THE COURT: Mr. Davis, let me ask you this. You having found the Defendant guilty then keep an open mind and based upon the totality of the evidence, in addition to maybe part two evidence, keep all that evidence, take all that evidence into consideration and base those and for the State to prove their case beyond a reasonable doubt as to Issue No. 1 and possibly Issue No. 2 regardless of what you've done in part one. Would you independently reassess and start all over again with regards to those issues putting the burden fully on the State as the law requires?
>
> [VENIREMEMBER:] I think so.
>
> * * *
>
> THE COURT: What I'm basically saying is you then have all that evidence but the issues are different. The first part saying guilty or not guilty. Now, you're answering specific special issues. Do you find from the evidence beyond a reasonable doubt that there's a probability of a continuing threat to society. Based upon the evidence, and if you found there's evidence there then you say yes if you're satisfied. Then if it's a situation where do you [sic] get Issue No. 2 it may not turn out to be, I don't know, but if you get Issue No. 2 then you would have to look at that independently even though having found the Defendant guilty the evidence may turn out to be different and it might be based upon the evidence create a reasonable doubt on that issue. But the important question is telling these lawyers can you keep an open mind and

> not say automatically yes or no one way or the other at this point?
>
> [VENIREMEMBER:] Yes.

While the veniremember could not think of a particular set of circumstances wherein he would answer the second question "no," he did state that he would keep an open mind and base his answer on the evidence presented. Given the totality of the voir dire, we hold that the trial court did not abuse its discretion in overruling appellant's challenge for cause to venireperson Davis. Garcia v. State, 887 S.W.2d 846, 855 (Tex. Crim. App. 1994), cert. denied, 115 S.Ct. 1317 (1995); Mooney v. State, 817 S.W.2d 693, 701 (1991); Adanandus, supra. **Point of error twenty-three is overruled.**

In point twenty-four, appellant complains that the trial court erred in overruling his challenge for cause to venireperson F. Koehler based on Koehler's statement that he could not completely follow the trial court's instruction to ignore the issue of parole. For his argument on this point, appellant conclusorily states that "Mr. Koehler has a bias and prejudice against a law upon which Appellant is entitled to rely." Appellant fails to cite any authority -- constitutional, statutory, caselaw, or rule -- to support his assertion. As such, we hold this point to be inadequately briefed and presenting nothing for review. Tex. R. App. Proc. 74(f). **Point of error twenty-four is overruled.**

Appellant asserts in his twenty-sixth point of error that the trial court erred in overruling his challenge for cause to veniremember D. Soles based on his apparent inability to conceive of a set of facts in which he would find sufficient mitigating evidence to answer the mitigation special issue in the affirmative. Specifically, appellant complains of the following colloquy:

> [APPELLANT:] Let me just ask the question this way: What I'm asking is, in a sense, if you can conceive of a situation in your own mind -- and I don't know what it is and I don't want to know -- but can you conceive of a situation in which you found somebody guilty of capital murder as charged in this indictment for murder intentionally or knowingly killing, and you found "yes," he would be a future danger and found "yes" to [the parties' issue].

> Can you conceive of any situation where, having done that, that you could find "yes" to the mitigation issue?
>
> [VENIREMEMBER:] Right now, my open mind, I would say no.

Immediately after this exchange, appellant passed the juror. However, the record also reveals that, prior to the asking of the above complained-of question, veniremember Soles responded to questioning from both the State and the judge that he could keep an open mind in regard to answering the punishment questions and that he would look at all of the evidence before answering them. Furthermore, he explicitly stated that, "[i]n the appropriate circumstances," he could find sufficient mitigating evidence to answer the punishment question on mitigation in the affirmative.

As with venireperson Davis in point twenty-three, supra, Soles expressed an inability to conceive of an appropriate set of circumstances at that particular moment. However, this fact does not automatically make Soles challengeable for cause. See Garcia and Mooney, both supra. Because Soles also indicated that he would keep an open mind and answer the questions based on the evidence presented, he was not challengeable for cause merely because he could not presently conceive of a particular situation in which he would answer the questions in a particular fashion. Given the totality of the voir dire, we hold that the trial court did not abuse its discretion in denying appellant's challenge for cause to veniremember Soles. Garcia, 887 S.W.2d at 855; Mooney, 817 S.W.2d at 701. Point of error twenty-six is overruled.

In point of error twenty-seven, appellant avers that the trial court erred in overruling his challenge for cause to R. Byers because Byers "was biased as a matter of law against Tex. Code Crim. Proc. Ann. art. 38.22." Specifically, appellant claims that the venireperson was biased against certain technical rules regarding the admission or exclusion of confessions. However, the record belies this complaint. When broadly discussing these various rules, appellant and Byers had the following exchange which appellant contends illustrates this bias as a matter of law:

[APPELLANT:] [Lawyers] do funny things with words and we take perfectly good words and we turn them into something that sounds horrible.

And, there's two words that we have taken that we have just turned into that that have a real bad flavor to them, and those words are bias and prejudice.

And really what they mean, bias and prejudice, they just don't like someone.

And I am biased against liver and onions. Real biased against liver and onions. And I'm just going to ask you flat out, are you biased and prejudiced against those laws of keeping evidence out, keeping voluntary statements out, keep certain technical rules, when they weren't met?

[VENIREMEMBER:] No, sir, not to that extent.

[APPELLANT:] What do you mean?

[VENIREMEMBER:] I said I have to live with the laws and rules as they are.

[APPELLANT:] Sure.

[VENIREMEMBER:] I don't have to like them.

[APPELLANT:] Well, that's what I'm asking?

[VENIREMEMBER:] I don't like income taxes, but I pay it every year, and I've never been audited, so that ought to tell you something.

[APPELLANT:] That's basically what I'm asking you. Are you biased and prejudiced against those laws, not whether you can follow them, but biased and prejudiced against them?

[VENIREMEMBER:] Yes, sir, I probably am in this context, probably am.

While appellant is correct in stating that a person shown to be biased as a matter of law must be excused when challenged, see Anderson v. State, 633 S.W.2d 851, 854 (Tex. Crim. App. 1982). we do not agree that this exchange, or even the totality of Byers' voir dire shows him to be so biased. In fact, we believe quite the contrary is shown. Byers freely admitted throughout his voir dire that he had certain opinions about various laws. However, he consistently maintained that, just because he was not fond of a particular law did not mean that he would not follow that law. And no where in his voir dire was it established that Byers would not or could not follow the trial court's instructions. As such, we hold that the trial court did not abuse its discretion in overruling appellant's challenge for cause of Byers. Hathorn v.

State, 848 S.W.2d 101, 110 (Tex. Crim. App. 1992), cert. denied, 113 S.Ct. 3062 (1993); Clark v. State, 717 S.W.2d 910, 917 (Tex. Crim. App. 1986), cert. denied, 481 U.S. 1059 (1987). Point of error twenty-seven is overruled.

In point of error twenty-five, appellant alleges that the trial court erred in granting the State's challenge for cause against Patrick Henry without allowing appellant to question the veniremember. The State, on the other hand, asserts that the veniremember was properly challenged for cause because he had a bias against the law upon which the State was entitled to rely.[1] See Tex. Code Crim. Proc. Ann. art. 35.16(b)(3). Thus, it was not error to refuse appellant the opportunity to question the juror.

The record reveals that Henry was called to individual voir dire and extensively questioned by the trial court. The State then proceeded to ask Henry a number of questions and attempted to clarify the issues brought up by the court's initial questioning. After the State's questioning, the trial judge again took over. Eventually the State was allowed to ask a few more questions and thereafter the trial court granted the State's challenge for cause. Appellant requested, but was denied the opportunity to ask Henry any questions. Appellant objected to the granting of the State's challenge for cause and also moved for a mistrial based upon the trial court's failure to allow him to rehabilitate the venireperson, which motion was denied.

Article 35.17(2) expressly provides:

> In a capital felony case in which the State seeks the death penalty, the court shall propound to the entire panel of prospective jurors questions concerning the principles, as applicable to the case on trial, of reasonable doubt, burden of proof, return of indictment by grand jury, presumption of innocence, and opinion.

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[1] The State does not expressly identify exactly what law the venireperson was supposed to be biased against, but mentions several possibilities. We glean from the State's brief, read in conjunction with the record, that the law in question concerns article 35.22, which states:

> When the jury has been selected, the following oath shall be administered them by the court or under its direction: "You and each of you do solemnly swear that in the case of the State of Texas against the defendant, you will a true verdict render according to the law and the evidence, so help you God."

> Then, on demand of the State or defendant, either is entitled to examine each juror on voir dire individually and apart from the entire panel, and may further question the juror on the principles propounded by the court.

(emphasis added). The language of the statute clearly indicates that the trial judge was obligated to allow appellant to propound questions to the venireperson on his demand, and we have repeatedly held that it is error for the trial court to fail to do so. E.g., Felder v. State, 848 S.W.2d 85, 91 (Tex. Crim. App. 1992), cert. denied, 114 S.Ct. 95 (1993). The only notable exception to this obligation arises under article 35.16(a)(10). Under this subsection, if a venireperson has established in his mind such a conclusion as to the guilt or innocence of the defendant as would influence his verdict, then "he shall be discharged without further interrogation by either party or the court." Tex. Code Crim. Proc. Ann. art. 35.16(a)(10); Gardner v. State, 733 S.W.2d 195, 209 (Tex. Crim. App. 1987), cert. denied, 488 U.S. 1034 (1989). Since this is not the scenario in the instant case, we hold that the trial court erred in denying appellant his right to question the prospective juror. Robinson v. State, 851 S.W.2d 216, 236 (Tex. Crim. App. 1991)(op. on appellant's motion for reh'g), cert. denied, 114 S.Ct. 2765 (1994); Felder, 848 S.W.2d at 91; Drinkard v. State, 776 S.W.2d 181, 184 (Tex. Crim. App. 1989); Perillo v. State, 656 S.W.2d 78, 80 (Tex. Crim. App. 1983).

However, error incurred by a trial court in refusing a defendant the opportunity to question a veniremember will be deemed harmless if, at the time the trial court grants the State's challenge for cause, the veniremember, through thorough and proper questioning by the prosecutor or the trial court, "made it absolutely and unmistakably clear" that his views would have prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath. Robinson, 851 S.W.2d at 236; see also Felder, 848 S.W.2d at 94.[19]

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[19] We recognize that the majority of the cases containing a point of error where the trial court refused the appellant an opportunity to question a veniremember are all cases concerning a venireperson's views on the death penalty, which is not the case here as reflected by the venireperson's own statement, supra. However, the analysis is the same. If the record is absolutely and

In other words, the record must absolutely and unequivocally show that the venireperson could not follow some aspect of the law due to his or her personal biases such that no conceivable questions from appellant could have changed his or her attitude, and hence, as a matter of law, the trial judge was obligated to dismiss that person. Cf. (Jimmy) Brown v. State, 913 S.W.2d 577 (Tex. Crim. App. 1996).[11]

To determine whether the error which occurred in the instant case amounts to reversible error, we review the totality of Henry's voir dire. Review of Henry's voir dire reveals that he was so uncomfortable with "sitting in judgment" of someone, that if selected as a juror he would not be able to take the jurors' oath

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unmistakably clear that the venireperson's views, whether of the death penalty or of some law upon which the State is entitled to rely, would have prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath, then no harm occurs as a result of the trial court's failure to allow the appellant to question the venireperson. See Rougeau v. State, 651 S.W.2d 739 (Tex. Crim. App. 1982), cert. denied, 485 U.S. 1029 (1988); see also Hernandez v. State, 757 S.W.2d 744, 751, n.12 (Tex. Crim. App. 1988) (plurality opinion), cert. denied, 112 S.Ct. 2944 (1992); Garrett v. State, 851 S.W.2d 853, 860, n.5 (Tex. Crim. App. 1993).

We note also that the "absolute and unmistakable" clarity required in the record where a party has been disallowed the opportunity to question a venireperson is not the same as the standard announced in Witherspoon v. Illinois, 391 U.S. 510 (1968), and subsequently modified by Wainwright v. Witt, 469 U.S. 412 (1985). The reason for this is that Witherspoon and Wainwright refer to the standard involved when reviewing a challenge for cause where both parties have had the opportunity to question the venireperson. However, the inquiry here comes into play when one party has been denied that right.

[11] As we stated in (Jimmy) Brown, supra:

> [N]othing is left to the discretion of the trial court when the venireperson is unequivocal as to their ability to follow the law. If they testify unequivocally that they can follow the law despite personal prejudices, the trial court abuses its discretion in allowing a challenge for cause on that basis. Likewise, if they testify unequivocally that they cannot follow the law due to their personal biases, the trial court abuses its discretion in failing to grant a challenge for cause on that basis. However, when the venireperson vacillates or equivocates on their ability to follow the law, the reviewing court must defer to the trial court's judgment.

See Riley v. State, 889 S.W.2d 290, 300-01 (Tex. Crim. App. 1993), cert. denied, ___ U.S. ___, 115 S.Ct. 2569 (1995). Furthermore, although we defer to the trial judge in the case of a vacillating or equivocating juror, the trial judge always abuses his discretion when he prematurely grants a challenge for cause of a vacillating or equivocating venireperson by failing to allow both sides to question the venireperson. See, e.g., Rougeau, supra.

and participate in the deliberation process. While Henry used the words "possibility" and "probability" rather than "definitely" or "absolutely," when viewing his voir dire as a whole, it is "absolutely and unmistakably clear" that his aversion to "judging" another person would have prevented or substantially impaired the performance of his duties as a juror in accordance with his instructions and his oath. At the end of Henry's voir dire, the trial court crystallized his views for him:

> THE COURT: Under the circumstances, what Mr. Henry has stated over and over again, "I would not be able to follow the law" insofar as dictates that he sit in judgment and he does not want to be forced to sit in judgment.
>
> That's correct, Mr. Henry?
>
> JUROR HENRY: That's correct.
>
> THE COURT: That if you get selected on the jury of 12 that you might very well be in the position where you will not render a verdict. Is that right?
>
> JUROR HENRY: That's right.
>
> THE COURT: That you will then maybe cause a situation where there's 11 jurors that vote one way and that you will just not vote one way or the other?
>
> JUROR HENRY: That's right.
>
> THE COURT: And that based on that, I'm assessing what I have heard and I want to make sure that I heard you correctly and that under those circumstances that basically you would not be able to follow that part of the law that states that you must return a verdict based upon the evidence that you would not be able to follow that; is that correct?
>
> JUROR HENRY: It's a possibility.
>
> THE COURT: Okay. And if I heard you correctly earlier, a possibility he was almost synopsis (sic) to probability because of how strong you feel?
>
> JUROR HENRY: That is correct.
>
> * * *
>
> THE COURT: So under those circumstances you might be likely or probably would be in the position to prevent a unanimous verdict?
>
> JUROR HENRY: Yes, that is correct.

These responses, summarizing Henry's views as conveyed repeatedly throughout his voir dire, demonstrate "absolutely and unmistakably" that Henry would be unable to take or follow the jurors' oath. It is clear that questions by appellant would not

have changed Henry's mind, as his position was firmly fixed. Accordingly, the trial court's error in refusing to permit appellant to ask questions of Henry was harmless. Point of error twenty-five is overruled.

The next several points of error all concern the exclusion of evidence.

In his twenty-eighth point of error appellant claims the trial court erred in excluding evidence of indictments against LaCedric Jones for purposes of impeachment. Sergeant Frederick Carroll testified for the State on direct examination about a number of witnesses he interviewed during his investigation of the instant offense:

> A. [Carroll] I spoke to a couple of other potential witnesses. . . . One was a LaCedric Jones and the other one was a Raylon Johnson.
>
> Q. [Prosecutor] . . . And based on -- Did you have a conversation with Raylon Johnson and LeCedric Jones?
>
> A. Yes, I did.
>
> Q. Okay. And did that help you in furthering your investigation as to the suspects in this case?
>
> A. Yes, it did.
>
> Q. After you talked to Raylon Johnson and LeCedric Jones, what else did you do --
>
> A. . . . A phone call was made to Tuscaloosa, Alabama.
>
> Q. And who did you call in Tuscaloosa?
>
> A. A fellow by the name of Jasper Finney.
>
> Q. And did you call Jasper Finney after you talked to LaCedric Jones and Raylon Johnson or before?
>
> A. Afterwards.
>
> Q. And what was the purpose of calling this Jasper Finney person?
>
> A. To get additional information regarding suspects.

On cross-examination Carroll was asked whether he was aware at the time of that conversation that Jones was under indictment for three counts of murder. The State objected and appellant argued that the State had offered a hearsay statement of Jones indirectly through Carroll's testimony and Jones was therefore subject to impeachment

under Rule of Criminal Evidence 806.[12] The trial court sustained the State's objection.

Appellant contends this case is controlled by Schaffer v. State, 777 S.W.2d 111 (Tex. Crim. App. 1989). In Schaffer, the defendant, who was charged with possession of a controlled substance, testified in his defense that he had been acting as an informant and working with a police officer named Jimmy Seals. Later, in rebuttal, the State called a police officer to testify:

> Q. Officer Segovia, when was the first time you heard the name of--a person by the name of Jimmy Seals?
>
> A. This morning.
>
> Q. And who, if anybody informed, you of that name?
>
> A. You did, sir.
>
> Q. And were you able to contact Officer Seals?
>
> A. Yes, sir.
>
> Q. And when was this?
>
> A. This morning.
>
> Q. And did you have occasion to talk to him?
>
> A. Yes, sir, I did.
>
> Q. Without telling us what he told you, Officer Segovia, would you, at this time, ask the State to drop charges against Mr. Schaffer?
>
> A. No, sir.

Id. at 113. The defendant objected that the State had elicited hearsay testimony when it received a negative answer to the question whether the charges against the defendant would be dropped. We agreed:

> . . . where there is an inescapable conclusion that a piece of evidence is being offered to prove statements made outside the courtroom, a party may not circumvent the hearsay prohibition through artful questioning designed to elicit hearsay indirectly. In short, "statement" as defined in Tex.R.Civ.Evid. 801 (now see Tex.R.Crim.Evid. 801(a)) necessarily includes proof of the statement whether the proof is direct or indirect.

Id. at 114. We concluded the State had elicited hearsay in that "Officer Segovia's testimony informed the jury that Seals told him

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[12] Rule of Criminal Evidence 806 provides in part that when a hearsay statement is admitted into evidence "the credibility of the declarant may be attacked."

that appellant was not an informant" and this out-of-court implied statement was offered for its truth.

The instant case is not controlled by Schaffer, but rather is controlled by Jones v. State, 843 S.W.2d 487 (Tex. Crim. App. 1992), cert. denied, 113 S.Ct. 1858 (1993). In Jones, a police officer testifying at trial repeated several out-of-court statements made by another witness which implicated the defendant. Based on these statements, the officer explained, he began to suspect the defendant and ultimately obtained an arrest warrant for him. Id. at 499. We held the extrajudicial statements were not inadmissible hearsay because they were admitted not to prove the truth of the matter asserted, but to explain how the defendant became a suspect. Id.

Here, Carroll's testimony showed how appellant became a suspect in the murders. Carroll testified that his conversation with Jones furthered his investigation by causing him to call another person who led him to contact someone else which eventually led to the identification of appellant. Because the statement was not offered for the truth of the matter asserted, but to show how appellant became a suspect, it was not objectionable hearsay and appellant was not entitled to impeach Jones under Rule 806. See Dinkins, 894 S.W.2d at 347. Point of error twenty-eight is overruled.

In his twenty-ninth point of error appellant claims the trial court erred in sustaining the State's objection to evidence that State's witness Serisa Ann Brown was threatened by an assistant district attorney if she did not testify consistent with her prior statement given the Houston police officers. In point of error thirty appellant claims the trial court erred in sustaining the State's objection to evidence that the State's witness Grace Brown was threatened by members of the Houston Police Department to make a statement.

Appellant's sisters, Serisa Brown and Grace Brown each testified about events involving appellant the day of the murders and immediately thereafter. The sisters testified that they gave

statements to the Houston police about these events. On cross-examination Serisa testified that she was threatened and cursed at by interrogating Houston police officer, Sergeant Novak, in the course of giving her statement.[13] Appellant sought to ask questions about discussions between Serisa and the assistant district attorney, but those attempts were ruled irrelevant. Appellant made a bill of exception establishing that Serisa would have testified she was threatened by the assistant district attorney with charges of perjury and contempt if her testimony was not consistent with the statement she gave to the Houston police. However, Serisa stated her testimony was unaffected by the threats.

On cross-examination of Grace Brown appellant attempted to question her about threats made by the Houston police officers who interrogated her, but the trial court ruled those questions irrelevant. In a bill of exception Grace stated that she was threatened with the loss of her nursing license and "all [her] material goods" and with prosecution for possession of fifty pounds of marijuana the police claimed was at her house. Like Serisa, Grace also stated her statement was not affected by the threats.

Appellant claims he was entitled to cross-examine Serisa and Grace about these threats because they went to show potential bias and motive to testify in line with what the State wanted. The trial court ruled that since the witnesses stated their testimony or statements were unaffected by the threats, they were not relevant. The State agrees with that position. We agree with appellant that the trial court erred in limiting the cross-examination.

"Cross-examination is the cornerstone of the criminal trial process and, as such, a defendant must be given wide latitude ... to impeach [a witness'] credibility." Love v. State, 861 S.W.2d 899 (Tex. Crim. App. 1993) (quoting Gutierrez v. State, 764 S.W.2d 796, 799 (Tex. Crim. App. 1989)). In Carroll v. State, 916 S.W.2d 494 (Tex. Crim. App. 1996), decided last term, we reiterated the

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[13] Serisa testified Sergeant Novak threatened to put her in jail and take her daughter away from her.

established notion that the scope of appropriate cross-examination for purposes of showing bias on the part of the witness is broad:

> A defendant is entitled to pursue all avenues of cross-examination reasonably calculated to expose a motive, bias or interest for the witness to testify. . . . [Further,]
>
> > . . . Evidence tending to show bias or interest of a witness in a cause covers a wide range and the field of external circumstances from which probable bias or interest may be inferred is infinite. The rule encompasses all facts and circumstances, which when tested by human experience, tend to show that a witness may shade his testimony for the purpose of helping to establish one side of the cause only.

Id. at 497-98 (quoting Jackson v. State, 482 S.W.2d 864, 868 (Tex. Crim. App. 1972))(emphasis in original). The defendant in Carroll sought to impeach a witness to the crime with evidence that the witness was incarcerated and awaiting trial on an aggravated robbery charge and that he had other felony convictions. The State argued that these matters were irrelevant. We held the trial court erred in limiting the cross-examination, stating "[a] defendant is permitted to elicit any fact from a witness intended to demonstrate that witness' vulnerable relationship with the State." Carroll, 916 S.W.2d at 500.[14]

We have also recognized that a witness' answers to questions posed may not be so important as the presentation of the questions themselves, as placement of the witness in the proper perspective is the key to effective cross-examination:

> An effective cross-examination encompasses more than just the opportunity to elicit testimony to establish the existence of certain facts. The cross-examiner should be allowed to expose the limits of the witness' knowledge of relevant facts, place the witness in his proper setting, and test the credibility of the witness. The failure to affirmatively establish the fact sought does not prevent the cross-examination from having probative value in regard to the witness' credibility. An unbelievable

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[14] In dissent, Judge Mansfield argued the trial court did not abuse its discretion in barring the cross-examination, pointing out that the witness testified at a hearing that "he had made no 'deals' with the State concerning his testimony and that his testimony would not be affected by the charge pending against him." Id. at 503 (Mansfield, J., dissenting). In a separate dissent, Judge Keller, joined by Presiding Judge McCormick, also emphasized that there was no evidence that the witness' testimony was influenced by the pending charge. Id. at 505 (Keller, J., dissenting). The majority was apparently not moved by the absence of evidence that the witness' testimony would be effected.

> denial of the existence of a fact can be even more probative as to the lack of credibility than an affirmative admission of the fact.

Spain v. State, 585 S.W.2d 705, 710 (Tex. Crim. App. 1979); see also Harris v. State, 642 S.W.2d 471, 476 (Tex. Crim. App. 1982), cert. denied, 484 U.S. 872 (1987) (essential policy underlying Sixth Amendment right to confrontation is to give accused opportunity to cross-examine witnesses).

We hold the trial court erred in barring the impeachment of Serisa and Grace. Even though they both stated their testimony or statement was unaffected by the threats, the jury should have been given the opportunity to place them in their proper perspective and evaluate their credibility in light of all the pertinent circumstances surrounding their statements and/or testimony. See Spain, supra. The fact that a witness says his statement or testimony is unaffected by the threats or circumstances bears upon the credibility of the witness, which is a matter to be decided by the jury. Appellant should have been given the opportunity to make plain to the jury that Serisa's testimony and Grace's statement were given under certain threats by the State, thus giving the jury the opportunity to judge the witness' credibility in light of those facts and decide for themselves whether their statements and testimony were affected by such threats.

We now turn to the question of harm. In Delaware v. Van Arsdall, 475 U.S. 673 (1986), the United States Supreme Court set forth the analysis to be applied when assessing harm in the case of improperly limited cross-examination. Id. at 684. We adopted the Van Arsdall harmless error test in Shelby v. State, 819 S.W.2d 544 (Tex. Crim. App. 1991), and explained its application:

> First, assume that the damaging potential of the cross-examination were fully realized. Van Arsdall, 106 S.Ct. at 1438. Second, with that assumption in mind, review the error in connection with the following factors:
>
> 1) The importance of the witness' testimony in the prosecution's case;
> 2) Whether the testimony was cumulative;
> 3) The presence or absence of evidence corroborating or contradicting the testimony of the witness on material points;

4) The extent of cross-examination otherwise permitted; and,
5) The overall strength of the prosecution's case.

Van Arsdall, 106 S.Ct. at 1438.

Finally, in light of the first two prongs, determine if the error was harmless beyond a reasonable doubt.

Shelby, 819 S.W.2d at 547; see also Young v. State, 891 S.W.2d 945, 948 (Tex. Crim. App. 1994)(applying Van Arsdall and Shelby to assess harm from erroneously limited cross-examination).

A review of the evidence presented at trial is necessary in performing this analysis. On the evening of June 20, 1992, at the Houston home of Rachel Tovar, six people were shot, four of whom died. Rachel Tovar was one of the survivors of the assault. In the hospital immediately after the incident, Tovar gave a recorded oral statement in which she stated that "Squirt" was one of the perpetrators and described the van he and his friends were driving. She subsequently identified appellant in a photospread. At trial Tovar identified appellant as the man she had referred to as "Squirt." Others also testified that appellant was known as "Squirt." Tovar further testified that she and her husband had sold marijuana and cocaine to appellant on several occasions. Tovar testified that on the day of the offense appellant and his friends came to her house about 2:00 or 3:00 in the afternoon to discuss the purchase of some cocaine and that they were driving a beige minivan. They left and returned around 6:00 p.m., and then left again only to return to the house a couple of hours later, at which time the shootings took place. Tovar testified that appellant bound her and five others who were in the house with strips of bedsheets appellant cut with a knife. The bound individuals were then placed in various rooms throughout the house. She heard gunshots from the other rooms and then she was shot. Tovar testified that she did not know who shot her, although she saw each of the three perpetrators with a gun at various times during the assault.

The other survivor, Nicholas Cortez Anzures, testified that he had gone to visit the Tovars' at about 10:00 p.m. on the evening of

the murders. He stated that he drove to the Tovars' house with some friends who waited for him in the car outside. He knocked on the door and was forced inside by appellant who was pointing a gun at the head of one of the victims. Cortez was taken to a back room by appellant and one of his cohorts, where he was bound and gagged. Cortez testified he heard a woman scream and shots from the front of the house. Then "the man with the chrome gun" and appellant came into the room and the man with the gun shot Cortez and another victim.

Candelario Hernandez testified that he drove with Cortez to the Tovar's house and waited in the car, expecting Cortez to return to the car quickly so that they could proceed to a party they planned to attend. Shortly after Cortez went inside Hernandez heard two sets of shots coming from the house and observed two black men exit the front door, get into a minivan, and drive away.

Rachel Tovar's neighbor testified that he was sitting in his front yard the night of the offense. He observed a van parked outside the Tovars' house and saw a black man going back and forth between the van and the house and putting something in the van. He further testified he heard three "popping sounds" and then the van left.[15] Shortly thereafter Rachel Tovar emerged from the house injured and calling for help.

Still another person, Daniel Leija, testified to having been at the Tovar's house earlier in the evening and seeing appellant there. He also testified that he had seen a van parked in front of the house.

Appellant's three sisters, Serisa Brown, Grace Brown and Carolyn Momoh, were all called as witnesses for the State. At the time of the offense, Serisa and her child and Carolyn and her two children were living with Grace at Grace's house in Houston. The sisters all testified that appellant and three of his friends, Marion Dudley, Tony Dunson and Maliek Travis, came to Grace's house

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[15] His statement given to police following the offense stated that the van pulled away and then he heard the popping sounds. At trial he stated that was not correct, that he had heard the pops before the van left.

in the early morning hours of June 20th. Appellant and his friends were driving a tan minivan with Alabama plates. They left and returned several times that day and evening. Sometime after midnight that night appellant asked Serisa and Carolyn to drive the van back to Tuscaloosa, Alabama for him the next morning.[16] He agreed to pay each of them $1,000 in return for driving the van.[17] Serisa and Carolyn took appellant to the airport the morning of June 21st and then the two women and their children left for Tuscaloosa in the van. Upon arrival in Tuscaloosa, Carolyn spoke with Grace by phone who informed Carolyn of a news report she had seen pertaining to the murder of several persons and stating that a van with Alabama plates was identified as having been at the scene. Carolyn and Serisa turned the van over to appellant and his friends in Tuscaloosa and collected their money. Carolyn and Serisa eventually gave statements to Alabama authorities, and all three of the sisters gave statements to the Houston police on June 26th.

Applying Van Arsall, we first assume that Grace and Serisa would have testified as appellant said they would in his bills of exception. See Shelby, 819 S.W.2d at 551 (in applying Van Arsdall analysis, assume jury was fully informed of matters kept out of cross-examination). Serisa would have testified that the assistant district attorney threatened to throw her in jail for contempt and charge her with perjury if she did not testify consistent with her June 26th statement. Grace would have testified that in the course of giving her statement she was threatened by Houston police officer Novak with the loss of her nursing license and all her material goods, and with prosecution of possession of 50 pounds of marijuana Novak claimed was at her house. Both sisters also would have testified, however, that the threats did not affect their statements or testimony.

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[16] Appellant's residence was in Tuscaloosa and his parents also lived there.

[17] Serisa testified that the money was payment for delivering cocaine that was in the van. Carolyn testified that she had no knowledge of drugs in the van.

With those assumptions in mind, we review the error in connection with the importance of the witness' testimony to the State's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, the overall strength of the prosecution's case. Van Arsdall, 106 S.Ct. at 1438.

Grace and Serisa's testimony was important to the prosecution's case primarily for its corroborative value. Their testimony as to appellant's comings and goings from their house on the day of the offense was consistent with Rachel Tovar's testimony as to appellant's arrivals and departures from her house on the day of the offense. In other words, their testimony provided an explanation for appellant's activities before and after the offense. Grace and Serisa's description of the van that appellant was driving was corroborative of other testimony from people who saw a van that fit the same description at the Tovar's house on the day and night of the offense. The sisters' testimony as to appellant's sudden request late on the night of the offense to drive the van to Tuscaloosa was consistent with an urgency to flee. Their testimony that appellant came to Houston periodically was consistent with Rachel Tovar's testimony that appellant had purchased drugs from her husband from time to time. Serisa's testimony that she understood the van was to contain cocaine for delivery to Tuscaloosa was consistent with Tovar's testimony that appellant had been in the process of negotiating the purchase of cocaine from her husband.

The State's case did not depend upon circumstantial evidence. The two survivors of the assault both identified appellant as one of the perpetrators. One of the survivors, Rachel Tovar, had known appellant for some time. Further, neither Grace nor Serisa testified that appellant made any confession to them about his involvement in the offense.

Considerable cross-examination of the sisters was otherwise permitted, including inquiry into threats and coercive tactics on

the part of Houston police officers in the course of taking Serisa's statement. In addition, appellant's sister Carolyn testified on cross-examination to threats and coercive conduct by Houston police when taking her statement and stated that she could hear similar activities going on in the next room with her sisters. Carolyn testified that at one point she was put in a room with Grace and subjected to more abusive discourse:

> The three of us, myself, my sister Grace and my friend Kirk Royster were put back in a room together where Novak continued his cursing and screaming and hissing almost.

Accordingly, as to the limitation on Grace's cross-examination, the jury had some inkling from other sources of coercive or abusive conduct on the part of Houston Police Department authorities.

As to the limitation on Serisa's cross-examination pertaining to threats by the district attorney's office, it is not so outrageous a notion that a witness will be told by the district attorney's office that perjury is a possibility if their testimony differs from a statement previously made by them under oath.[11]

Finally, in light of the strength of the State's case apart from the witnesses' testimony, in view of the fact that the witnesses both testified that the threats made no difference to their testimony or statements, and in view of the fact that the jury was privy to some testimony of threats by law enforcement authorities, we conclude the limitation on Serisa's and Grace's cross-examination was harmless beyond a reasonable doubt. Points of error twenty-nine and thirty are overruled.

In related points of error forty-three and forty-four, appellant complains about the admission of evidence provided by Carolyn Momoh. In his forty-third point of error, appellant claims the State engaged in prosecutorial misconduct by coercing Carolyn to give perjured testimony. In point forty-four appellant claims

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[11] Serisa testified that she was given immunity by the State for any perjury committed in giving her statement to Alabama authorities, but there is no indication as to the contents of her Alabama statement. However, appellant does not suggest that Serisa's statement made to Houston authorities was influenced by coercion. Appellant's complaint as to Serisa is alleged coercion by the district attorney's office which might have affected her testimony.

the trial court erred in overruling his motion for mistrial based on the coercion of Carolyn's testimony.

The facts pertinent to these points of error are as follows. The State sought to call Carolyn as a witness during its case-in-chief. George Parnham, Carolyn's attorney, objected to the witness taking the oath, suggesting that if her trial testimony was inconsistent with her prior written statement she gave to Houston Police she would be subject to prosecution for aggravated perjury. Carolyn eventually agreed to take the oath and was sworn as a witness. She refused to testify, however, and asserted her Fifth Amendment privilege. The trial court found that Carolyn did not have a valid Fifth Amendment privilege and ordered her to testify. She continued to refuse to testify and the trial court found her in contempt of court and ordered her confined in the Harris County jail. Upon a Motion for Leave to File an Application for Writ of Habeas Corpus to this Court, we ordered Carolyn released on posting of a personal bond. We later denied Carolyn's Motion for Leave to File and she was again incarcerated in the Harris County jail. The State called Carolyn once more and she finally agreed to testify.[11]

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[11] Carolyn Momoh testified on direct examination that appellant confessed to her his involvement in the offense, but recanted that testimony on cross examination. On direct examination Carolyn testified that when she took appellant to the airport on the morning of June 21st, he confessed to having killed six people. This was consistent with what she told the Houston police on June 26th. On cross-examination, Carolyn testified that she was threatened and cursed at by the Houston police in the course of giving her June 26th statement. She said she was told that she could not leave until she "got it right." She was told there was a pending federal warrant for her arrest. She stated she would not have testified consistent with her June 26th statement if she had not been threatened with contempt and six months in jail and/or a charge of aggravated perjury. She then testified to "inaccuracies" in her June 26th statement that she claimed were made due to the alleged threats:

> Q. Did you change any of your statements that you told the police, did you change them and put something different, allow something different to be put in the written statement because of the threats and coercion?
>
> A. Yes.
>
> * * *
>
> Q. . . . Was it accurate or not accurate that [appellant] actually said anything to you about having shot anyone?
>
> A. That's inaccurate.

The State first called Carolyn outside the presence of the jury, at which time her testimony was consistent with her prior written statement. Because Carolyn's testimony outside the jury's presence was consistent with her statement, the State decided to call her as a witness in front of the jury. Carolyn's testimony was again consistent with her prior written statement. On cross-examination by the defense, however, the witness testified inconsistently with her prior written statement and her direct examination testimony. Carolyn stated that she lied to the police about appellant admitting that he committed the offense and that she made up statements to that effect.

Appellant contends that the record indicates Carolyn, through her attorney, warned the State that if she testified truthfully at trial, her testimony would be inconsistent with her statements to police. Appellant asserts that Carolyn was threatened with an indictment for perjury if her testimony was inconsistent and that such threat formed the basis of her invocation of her Fifth Amendment rights. The trial court ordered Carolyn to testify, holding that she did not have a Fifth Amendment right to refuse to testify. The trial court and the State informed Carolyn that if she refused to testify she would be held in contempt of court and incarcerated for the duration of the trial and for up to six months thereafter. Appellant argues that the threat of perjury charges and being held in contempt caused Carolyn's testimony to be "so tainted . . . that it amounted to a Due Process/Due Course of Law violation for the State to call her before the jury."

Q. . . . Was that something that the police wanted you to get right?

A. That was one of the things, yes.

* * *

Q. Do you believe that your brother did this?

A. No.

Q. And did your brother ever tell you that he did it?

A. No.

Appellant cites Webb v. Texas, 409 U.S. 95 (1972), in support of his position. In Webb, the United States Supreme Court addressed a situation in which a trial judge threatened the only defense witness with penalties of perjury as the witness got on the stand. The trial court gave the witness the following admonishments regarding the consequences of committing perjury:

> It is the Court's duty to admonish you that you don't have to testify, that anything you say can and will be used against you. If you take the witness stand and lie under oath, the Court will personally see that your case goes to the grand jury and you will be indicted for perjury and the likelihood [sic] is that you would get convicted of perjury and that it would be stacked onto what you have already got, so that is the matter you have to make up your mind on. If you get on the witness stand and lie, it is probably going to mean several years and at least more time that you are going to have to serve. It will also be held against you in the penitentiary when you're up for parole and the Court wants you to thoroughly understand the chances you're taking by getting on that witness stand under oath. You may tell the truth and if you do, that is all right, but if you lie you can get into real trouble.

Id. at 95-96. Defense counsel objected to the trial judge's comments on the ground that the judge was exerting such duress on the mind of the witness that the witness could not freely and voluntarily testify. Id. at 96. Subsequent to the trial court warnings, the witness refused to testify and was excused by the court. Id. The Supreme Court concluded that the trial judge's remarks "effectively drove [the] witness off the stand, and thus" violated the defendant's due process rights. Id. at 98. The Court noted that the judge did not stop at warning the witness of his right to refuse to testify, but that the judge also implied that he expected the witness to lie, and assured him that if he did lie, he would be prosecuted and probably convicted of perjury. Id. at 97.

Appellant also relies on Davis v. State, 831 S.W.2d 426 (Tex. App.-- Austin, 1992, pet. ref'd). In Davis, the district attorney threatened a defense witness with a grand jury indictment for perjury if her original testimony was found to be false. Additionally, the district attorney

> told [the witness] that there was a conflict between her testimony and that of the other witnesses; that if he could not resolve this conflict he would present the matter to the grand jury; and that if the officers had lied he would indict the officers, or 'the reverse if she had not told the truth.' He also told her that he had

> 'already put one person in jail for lying on the stand last year.' He said he then asked her if she might have been mistaken about [her testimony]. She said she had been mistaken.

Id. at 438. The court of appeals noted that there was "no bright line of demarcation between proper and improper perjury warnings," but that the district attorney had gone "far beyond a cautious and judicious warning." Id. The court noted that the discussion between the witness and the district attorney occurred outside the context of the trial court and in the district attorney's office, a setting potentially conducive to intimidation. Further, the court stated, "the tenor of the district attorney's comments were more threatening than a simple warning would need to be." Id. The court of appeals held the district attorney's actions were "calculated to intimidate [the witness] into changing her testimony" and were therefore improper. Id. at 439.

Appellant claims the State told Carolyn that she was going to stay in jail until she testified and possibly for six months after the trial, and that a perjury indictment would follow testimony inconsistent with her statement. He argues "[t]his overwhelming threat of the criminal justice system and incarceration was sufficient to cause [Carolyn] to cave into the State's intimidation . . . ." We do not agree.

We do not find the State's comments regarding the possibility of perjury charges and incarceration for contempt rise to the level of the type disapproved of in Webb and Davis. All the discussions surrounding Carolyn's testimony took place in the courtroom with both parties and the trial judge present. The witness' attorney, and not the State, brought up the subject of perjury and contempt when it asked the court what would happen if Carolyn refused to take the oath and to testify. The State repeatedly indicated that it had no reason to disbelieve the truth of Carolyn's statement to police, especially since Carolyn reiterated the truth of her statement to the prosecutors prior to trial. Appellant concedes there is nothing in the record to suggest that the State believed Carolyn's statement to the police was untruthful. The State acknowledged that if Carolyn's trial testimony differed from her

prior statement to police, she would be subject to perjury charges. The State also made it clear that if the witness was held in contempt for refusing to testify, the trial court was going to have to determine the appropriate punishment, not the State. Appellant does not cite to any part of the statement of facts where the State made threatening or coercive comments which could be said to have intimidated Carolyn into testifying consistent with her statement to police. Perhaps more importantly, Carolyn refused to testify despite the trial court's admonishments and the State's comments concerning perjury and contempt.

Appellant has not demonstrated any misconduct or coercion on the part of the State, and as such, the trial court did not err in overruling appellant's motion for mistrial. **Points of error forty-three and forty-four are overruled.**

In his forty-fifth point of error, appellant complains the trial court erred in overruling his objection to the admission of State's exhibit 77, Carolyn's written statement. The State offered Carolyn's statement under two theories: (1) as a prior consistent statement; and (2) to show the witness' state of mind. Because we believe the statement was admissible as a prior consistent statement, we will address the admissibility of the evidence on that ground only.

Under Tex. R. Crim. Evid. 801(e)(1)(B), the prior consistent statement of a witness is admissible to rebut an express or implied charge of recent fabrication or improper influence or motive if the statement was made before the motive to fabricate arose. Moody v. State, 827 S.W.2d 875, 894 n.11 (Tex. Crim. App. 1992), cert. denied, ___ U.S. ___, 113 S.Ct. 119 (1992). In this case, cross-examination raised an implied charge that Carolyn's trial testimony was the result of improper influence, ie., threats of perjury and contempt. Evidence of her prior statement to police, which was consistent with her testimony, rebutted appellant's charge. See Dowthitt v. State, No. 71,554 (Tex. Crim. App. June 26, 1996). **Point of error forty-five is overruled.**

In point of error thirty-one, appellant claims the trial court erred in sustaining the State's objection to the proffered cross-examination testimony of Rachel Tovar that her son Frank Farias, one of the murder victims, was scheduled to testify in a trial the Monday after the murders. Appellant wanted to introduce Rachel Tovar's testimony to show that a third party had a motive to kill Frank Farias. The State objected to this testimony, which objection was sustained by the trial court.

The general rule is that an accused may not bring in evidence that a third person may have had a motive to commit the crime with which the accused is charged. Spence v. State, 795 S.W.2d 743, 754 (Tex. Crim. App. 1990), cert. denied, 499 U.S. 931 (1991); Williams v. State, 643 S.W.2d 477, 483 (Tex. Crim. App. 1982). An exception exists if the accused can link the third person to the crime. Spence, 795 S.W.2d at 754-55. "Some testimony must be offered showing opportunity on the part of such third person, and testimony tending to show that such party may have committed the offense." Williams, 643 S.W.2d at 483 (quoting Porch v. State, 50 Tex. Crim. R. 335, 99 S.W. 102 (1906)). Appellant did not present any evidence in his proffer that would fall within the exception. **Appellant's thirty-first point of error is overruled.**

In points of error thirty-two and thirty-three, appellant complains of the trial court's decision to exclude evidence Rachel Tovar made a claim to $5000 which the State sought to forfeit as contraband "drug money." Although it is not entirely clear from his brief, we perceive appellant's contention to be that this evidence is admissible for impeachment purposes under the Sixth Amendment of the United States Constitution and Article I, § 10 of the Texas Constitution. However, appellant makes no argument nor does he cite any authority in support of admission of the evidence on these grounds.

Appellant argues the evidence was admissible for two reasons: (1) to correct the false impression Rachel Tovar made when she testified she was not involved in the drug business other than for the purpose of aiding her husband; and (2) to show Rachel Tovar had

a financial interest in the money, and therefore, a motive to testify for the State. Aside from a general discussion concerning impeachment with bias and prejudice, appellant again fails to offer any authority in support of his position that it was error to exclude this evidence. Virtually all of appellant's argument centers on whether or not the State had evidence the $5000 was contraband. These points of error are inadequately briefed and present nothing for review.[20] Pierce v. State, 777 S.W.2d 399, 418 (Tex. Crim. App. 1989), cert. denied, 496 U.S. 912 (1990). Points of error thirty-two and thirty-three are overruled.

Even if the $5000 was "drug money," Rachel Tovar's claim to it does not establish her status as a participant in the drug business. Further, assuming it was error to exclude this testimony, other evidence on the issue of Rachel Tovar's participation in the drug business was introduced; Tovar testified in front of the jury to several drug transactions in which she was involved.

In points of error thirty-four through thirty-seven, appellant complains about the trial court's exclusion of testimony concerning an individual named Marcus Terrell Hill. Specifically, appellant objects to testimony that Hill offered to buy the murder weapon and that Hill said the weapon could get him trouble. A review of the record shows appellant wished to introduce this testimony in support of his theory that Hill was connected to the killings. In his brief on appeal, however, appellant fails to argue that the testimony about Hill is relevant to connect Hill to the murders. Aside from the evidence he claims was wrongfully excluded, appellant does not set out what evidence, if any, he presented to the trial court connecting Hill to the killings. In these four points of error, therefore, we are left to guess, at the very least, why this evidence is relevant.

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[20] Appellant makes the conclusory statement that "the Harris County District Attorney's office has the power to nonsuit the forfeiture or to settle with Mrs. Tovar, thereby putting money in her pocket" to show Rachel Tovar had a "financial interest" to testify for the State. Appellant does not offer any argument or authority for this statement.

In points of error thirty-four through thirty-six, appellant complains about the trial court's exclusion of testimony concerning a gun identified as one of the murder weapons. Appellant argues the trial court erred in sustaining the State's hearsay objection to the proffered testimony from defense witnesses DeAndrea Dunn and Joe Winters that Marcus Terrell Hill offered Dunn $1,000 for the gun and told Dunn the gun could get Hill into trouble.

In the proffer at trial, Dunn testified that during a search of his car pursuant to an arrest unrelated to the instant offense, police officers recovered the gun in question. Dunn stated that Hill contacted him in jail and offered him $1,000 for the gun and that Hill told him he had originally bought the gun for a woman named Monica Dotson. Dunn also testified that Hill did not say why he wanted the gun, only that it could get Hill in trouble. Appellant next proffered Winters' testimony. Winters testified that Hill stated that he wanted the gun back. The State objected to the proffered testimony as hearsay and the trial court sustained the objection.

Appellant claims the statements were admissible under two theories: (1) the "verbal act doctrine" and (2) the statement against penal interest hearsay exception found in Tex. R. Crim. Evid. 803(24). The "verbal act doctrine," appellant explains, comes into play when a statement has independent significance and is not offered for the truth of the matter asserted. Appellant argues that Hill's statements offering to purchase the gun do not fall within the definition of hearsay because they were not offered for the truth of the matter asserted. See Tex. R. Crim. Evid. 801(d). Appellant cites the "classic example" of a verbal act as an offer and acceptance forming a contract. Applied to the facts of this case, appellant argues, Hill's offer to purchase the gun was an offer to form a contract and has significance apart from the truth of the statement.

Appellant's argument is not only without merit, but also internally contradictory. Appellant claims the statements were both non-hearsay and admissible to show Hill's desire to purchase

the murder weapon (the truth of the matter asserted). These two claims are inconsistent. If appellant was offering the testimony as evidence of Hill's involvement in the murders by virtue of his interest in buying the gun, then clearly the statements were offered to show the truth of the matter asserted, ie., that Hill offered to buy the murder weapon. See Madden v. State, 799 S.W.2d 683, 698 (Tex. Crim. App. 1990), cert. denied, 499 U.S. 954 (1991) (written list of weapons and serial numbers introduced for truth of matter stated, ie., weapons owned by particular individual).

Appellant next argues Hill's statement that the gun could get him in trouble was admissible as a statement against penal interest under Rule 803(24).[21] The first inquiry pertinent to this hearsay exception is whether Hill's statement tended to expose him to criminal liability. See Davis v. State, 872 S.W.2d 743, 747 (Tex. Crim. App. 1994). Appellant claims Hill's statement that the gun could get him into trouble circumstantially points to Hill's involvement in the murders. Although he does not argue it in his brief, we assume appellant believes that in some way Hill's statement tended to expose him to criminal liability, specifically murder.[22] At trial, the State argued there was evidence that the gun was stolen and that Hill's statement that the gun could get him in trouble was based on that fact. In his brief, appellant conceeds the State's interpretation is reasonable, but states "[e]ven so, it remains a statement against penal interest in that possession of stolen property is a crime."

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[21] Rule 803(24) states:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
> (24) **Statement against interest.** A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject him to civil or criminal liability, or to render invalid a claim by him against another, or to make him an object of hatred, ridicle, or disgrace, that a reasonable man in his position wold not have made the statement unless he believed it to be true. A statement tending to expose the declarant to criminal liability is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement.

[22] This is the only place in his brief that appellant mentions his theory that Hill was connected to the killings.

A trial court's decision to refuse to admit hearsay evidence under Rule 803(24) will be reviewed under an abuse of discretion standard.[33] See Cunningham v. State, 877 S.W.2d 310, 313 (Tex. Crim. App. 1994). Hill's statement was vague and could have had numerous meanings. According to Dunn and Winters, Hill did not explain why the gun could get him in trouble. In view of the facts presented at trial, or lack thereof, concerning Hill's motivation to get possession of the gun, we cannot say the trial court abused its discretion in excluding the testimony. Points of error thirty-four through thirty-six are overruled.

In his thirty-seventh point of error, appellant claims the trial court erred in sustaining the State's hearsay objection to testimony from Monica Dotson that Hill became upset when she told him that she had given the gun to Dunn. The questioning on this matter was as follows:

> Q: (DEFENSE COUNSEL:) Did you ever tell Marcus Terrell Hill that you had given the gun to DeAndrea Dunn?
>
> A: (WITNESS:) Yes.
>
> Q: How did he act, and I'm not talking about words, I'm talking about what his demeanor [sic], how did he appear?

The State objected on relevancy and hearsay grounds. Outside the presence of the jury, defense counsel stated the witness would testify that Hill "got upset." The trial court held "to the extent it might be an assertive nonverbal comment, it might constitute hearsay . . . " and, upon finding that the testimony did not fit either hearsay exception offered by appellant, excluded the evidence.[34]

On appeal, appellant argues Dotson's testimony did not constitute hearsay because it does not fall within Tex. R. Crim.

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[33] Here, the trial court explained its reasons for excluding the hearsay evidence under Rule 803(24) as follows:

> While [the statement] might express knowledge that could be knowledge about communicating from your client from Dudley or from street talk or from anywhere. So it's not given much trustworthiness or credence and of course it removes even further the element of criminal liability concerns.

[34] Appellant argued the testimony was admissible under Tex. R. Crim. Evid. 803(1) and 803(3).

Evid. 801(a)'s definition of a hearsay statement. Rule 801(d) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(a) includes nonverbal conduct of a person within the definition of a statement if the conduct was intended by the declarant as a substitute for verbal expression. Appellant claims that because Hill did not make a statement when he became upset, and Dotson was merely relating Hill's reaction to her statement, Dotson's testimony as to Hill's reaction was not hearsay.

We agree with appellant that Dotson's testimony did not constitute hearsay. Hill's reaction was nonassertive nonverbal conduct. See, e.g., Foster v. State, 779 S.W.2d 845, 863 n.5 (Tex. Crim. App. 1989), cert. denied, 110 S.Ct. 1505 (1990) (stating nonverbal conduct considered hearsay only when an assertive substitute for verbal expression); Rodriguez v. State, 903 S.W.2d 405, 411 (Tex. App.-- Texarkana 1995) (pet. ref'd) (holding record did not support argument that failure to make statement was substitute for verbal expression); GOODE, WELLBORN, & SHARLOT, 2 TEXAS PRACTICE § 801.2, at 97 (2nd ed. 1993) (nonverbal, nonassertive conduct is admissible nonhearsay). There is no evidence that Hill intended his reaction to substitute for a verbal expression. Hill's conduct was a reaction to Dotson's statement that she gave Dunn the gun. Hence, the conduct was not hearsay and the State's objection was not sustainable on that ground.

Although Dotson's testimony describing Hill's reaction was not hearsay, the trial court did not err in refusing to admit it. If the trial judge's decision to admit or exclude evidence is correct on any theory of law applicable to the case, it will be sustained. Romero v. State, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990). This is true even if the trial judge gives the wrong reason for his decision. Calloway v. State, 743 S.W.2d 645, 651-52 (Tex. Crim. App. 1988). As we noted above, appellant fails to explain why, in general, testimony about Hill was relevant to the instant case. Further, he specifically fails to explain why Dotson's testimony

concerning Hill's reaction was relevant. The trial court's refusal to admit the testimony can be upheld on the theory that the testimony was not relevant in view of the lack of evidence and argument connecting Hill to the murders. Accordingly, we find the court did not err in excluding the evidence. **Point of error thirty-seven is overruled.**

Points of error thirty-eight through forty-two all pertain to the allegedly erroneous admission of evidence. In point thirty-eight, appellant asserts that the trial court erred in overruling his hearsay objection to testimony concerning the contents of a television news show. The exchange of import is as follows:

> [THE STATE:] [W]hile you were awake, between 12:00 noon and 12:00 midnight when you talked to Carolyn, did you see or hear anything that disturbed you in any way?
>
> [WITNESS:] The news.
>
> [THE STATE:] And what did you hear on the news that disturbed you?
>
> [DEFENSE COUNSEL:] Judge, I'm going to object to anything she heard on the news as hearsay.
>
> THE COURT: Okay.
>
> [THE STATE:] Judge, it goes to her state of mind. She was disturbed about something.
>
> THE COURT: The objection is overruled.
>
> [DEFENSE COUNSEL:] I would ask that we take this up outside the presence of the jury.
>
> THE COURT: Not at this time. It's a very narrow question at this point. Just -- the Court has ruled and we will go ahead and proceed.
>
> [THE STATE:] What did you see on the news that disturbed you?
>
> [WITNESS:] Would you repeat that, please?
>
> [THE STATE:] What was it that you saw on the news that disturbed you?
>
> [WITNESS:] It was a news report about a murder that had taken place.
>
> [THE STATE:] Okay. What kind of a murder?
>
> [WITNESS:] I don't know. It was -- I'm trying to remember. And it was about a murder that had taken place and they said there was a van at the scene, Alabama plates on it.
>
> [THE STATE:] And why did that concern you? Why were you concerned about some news report

> that there was some people that were killed and there was a van with Alabama plates?
>
> [WITNESS:] Because of the van with Alabama plates, you know, having seen a van with Alabama plates at my house.

"Hearsay" is defined as an out-of-court statement offered for the truth of the matter asserted. Tex. R. Crim. Evid. 801(d). A statement offered for the purpose of showing what was said rather than for the truth of the matter asserted does not constitute hearsay. Livingston v. State, 739 S.W.2d 311, 331 (Tex. Crim. App. 1987), cert. denied, 487 U.S. 1210 (1988). Here, the State introduced the statement merely to show what was said and how the statement affected the witness. Hence, the trial court did not err in overruling appellant's objection. Point of error thirty-eight is overruled.

In his thirty-ninth point of error, appellant claims the trial court erred in overruling his objection to admission of his "post arrest unrecorded oral statements." Captain Mike Everett of the Tuscaloosa, Alabama Police Department testified that he assisted the Federal Bureau of Investigation (F.B.I.) in apprehending appellant in an apartment building in Alabama. Captain Everett stated that he arrested appellant and advised him of his Miranda rights. Captain Everett asked appellant if he understood his rights and appellant stated that he did. The officer then asked appellant whether he had any weapons in the apartment. Appellant indicated that he had a weapon, as well as an address book, in the other bedroom of the apartment.

Appellant claims that his statements regarding the weapon and address book were inadmissible because he did not waive his Miranda rights.[25] There is no dispute that appellant was properly informed of his Fifth Amendment rights and that he fully understood those rights. Appellant does not allege that he was coerced to speak to Captain Everett. Appellant's complaint is that he did not

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[25] Appellant also claims his statements were inadmissible pursuant to Tex. Code Crim. Proc. Ann. arts. 38.22 and 38.23. However, because appellant failed to offer any argument or authority in support of his contention, we decline to address that portion of his point of error.

specifically state that he was waiving his rights. To illustrate appellant's argument, we cite the following exchange which took place at trial outside the presence of the jury:

> Q: [DEFENSE COUNSEL:] Well, after he [appellant] said that he understood those rights, did you again go through each one of those rights to see if he waived those rights?
>
> A: [CAPTAIN EVERETT:] Individually?
>
> Q: Yes.
>
> A: No, ma'am. I asked him if he understood his rights, and he replied, yes, I do.
>
> Q: But he did not ever specifically waive any of those rights, did he?
>
> A: I don't understand what you mean.
>
> Q: Well, did he waive his right to have an attorney present?
>
> A: He didn't ask for an attorney.
>
> Q: Did he waive his right to have an attorney present?
>
> A: He did not ask for an attorney.
>
> Q: Did he waive his right?
>
> COURT: Ms. Saum, he's answered.
>
> [DEFENSE COUNSEL:] Well, he's not answering it, yes.
>
> COURT: You know what he means.

We have found that the oral confession statute does not require an express verbal statement from an accused that he waives his rights prior to giving the statement. Cf. Barefield v. State, 784 S.W.2d 38, 40 (Tex. Crim. App. 1989), cert. denied, 497 U.S. 1010 (1990) (interpreting waiver provision of Tex. Code Crim. Proc. Ann. art. 38.22, § 3(a)(2)). Waiver can be inferred from the actions and words of an accused. See Mays v. State, 726 S.W.2d 937, 946 (Tex. Crim. App. 1986), cert. denied, 484 U.S. 1079 (1988) (discussing waiver of one's right to attorney). Only after appellant was advised of his Fifth Amendment rights and appellant indicated that he understood them did Captain Everett ask appellant if he had a weapon. Appellant's response can be inferred as a waiver of his Miranda rights, and accordingly, the trial court did not err in allowing appellant's statements at trial. Point of error thirty-nine is overruled.

In related points of error forty and forty-one, appellant complains that the trial court erred in overruling his objection to the admission of physical evidence seized at the time of his arrest. Appellant argues that because the arresting officers did not have a search warrant, the seizure of appellant's weapon, address book, and the contents of the address book, must be predicated upon an exception to the Fourth Amendment warrant requirement. While he concedes that an exception exists in the right of officers to conduct a protective sweep of the area immediately surrounding the individual arrested, appellant asserts that Captain Everett's explanation that the search was conducted in the interests of "officer safety" is unsupported by the facts.

In Maryland v. Buie, 494 U.S. 327 (1990), the United States Supreme Court described a protective sweep as follows:

> [It] is a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others. It is narrowly confined to a cursory visual inspection of those places in which a person might be hiding.

The Supreme Court stated that "[t]he Fourth Amendment permits a properly limited protective sweep in conjunction with an in-home arrest when the searching officer possesses a reasonable belief based on specific and articulable facts that the area to be swept harbors an individual posing a danger to those on the arrest scene." Captain Everett, appellant contends, "failed to state any facts upon which either he or this Court can base a determination of reasonable suspicion that a person or persons in that bedroom posed a threat to the officers."

Captain Everett testified that he asked appellant if he had a weapon in order to insure the officers' safety and the record demonstrates that the facts known to Captain Everett, together with the rational inferences from those facts, authorized a protective sweep of the apartment. Captain Everett testified he knocked at the door of the apartment, having information that appellant was in the apartment, but no one answered. The officers gained access to the apartment after obtaining a key, and found appellant hiding under a bed. Appellant was arrested, handcuffed, and given his

Miranda warnings. Captain Everett testified he had information other persons besides appellant might be in the apartment. Further, Captain Everett knew the apartment was leased to someone other than appellant, so it was not unreasonable for him to believe someone else was in the apartment and had access to the weapon. In view of the foregoing, as well as the fact appellant was a fugitive avoiding prosecution for a violent capital murder, it was reasonable for Capitain Everett to believe he needed to conduct a protective sweep of the area in the interest of the officers' safety. Accordingly, we find that the weapon was legally seized pursuant to an exception to the Fourth Amendment.

Appellant argues that even if the weapon was legally seized, it was not relevant and should have been excluded under Texas Rule of Criminal Evidence 401. The State argues the evidence was relevant to show flight and to rebut appellant's theory that someone else committed the crime. Throughout the trial, defense counsel tried to introduce evidence that someone other than appellant committed the murders. This defense tactic made relevant evidence tending to show appellant's consciousness of guilt. Evidence of flight is admissible as circumstantial evidence of guilt. Bigby v. State, 892 S.W.2d 864, 883 (Tex. Crim. App. 1994), cert. denied, 115 S.Ct. 2617 (1995). The fact that appellant was armed and hiding from the officers is indicative of flight. See Foster, 779 S.W.2d at 859-60; Churchill v. State, 317 S.W.2d 541, 542 (Tex. Crim. App. 1958). Appellant's actions are consistent with those of a fugitive.

Finally, appellant argues the evidence is inadmissible under Rule 403 because "[t]he incremental value of the admission of such evidence of flight is slight compared to its unfair prejudicial value." Appellant offers no argument or authority in support of this contention, and as such, it is inadequately briefed.[26] See Tex. R. App. P. 74(f).

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[26] We note that the State did not attempt to prove that the weapon was one of the guns used to commit the murders.

As for the address book and its contents, we agree with appellant that the trial court erred in admitting them into evidence. A protective sweep is permissible on less than probable cause only because it is limited to that which is necessary to protect the safety of officers and others. See Buie, 494 U.S. at 335 n.3. The address book and its contents, unlike the weapon, cannot be said to have posed any danger to the officers' safety, and therefore, the seizure of those items does not fall within the exception to the Fourth Amendment under Buie. Nonetheless, we find that admission of the evidence was harmless. The only reference we found in the record concerning this evidence was a single sentence in the State's closing argument. Points of error forty and forty-one are overruled.

In point of error forty-two, appellant claims the trial court erred in overruling his objection to the admission of State's Exhibit 82, the written statement of witness Rachel Tovar. In addressing this point of error we set out the following sequence of events. On June 21, 1992, the day after the murders, while she was in the hospital recovering from a gunshot wound to her head, Tovar gave a recorded oral statement to officers of the Houston Police Department. On July 7, 1992, about two weeks after the offense, Tovar gave a sworn written statement to the police. During defense counsel's cross-examination of Tovar at trial, the witness repeatedly testified that she did not remember speaking with the officers the day following the murders. After listening to her tape recorded statement, Tovar testified that she recognized her voice on the tape and that some of the statements she made were correct and some were not. Appellant introduced the recorded oral statement, Defense Exhibit 109, "so that the jury can determine Ms. Tovar's credibility about whether or not she didn't remember talking to those officers." In rebuttal to the introduction of Defense Exhibit 109, the State offered Tovar's written statement as a prior consistent statement under Tex. R. Crim. Evid. 801(e)(1)(B). Although the written statement was offered under Rule 801(e)(1)(B), the trial court allowed it in under Tex. R.

Crim. Evid. 106. The trial court admitted both Defense Exhibit 109 and State Exhibit 82, with instructions to the jury that the statements were not offered for the truth of the matter asserted but for the limited purpose of determining Tovar's credibility.

Appellant claims the court erred in admitting the written statement under both Rule 801(e)(1)(B) and Rule 106.[27] We will address appellant's Rule 801(e)(1)(B) complaint first.

Under Rule 801(e)(1)(B), the prior consistent statement of a witness is admissible if it is consistent with his testimony at trial and is offered to rebut an express or implied charge of recent fabrication or improper influence or motive. See Moody, 827 S.W.2d at 894. Appellant argues Tovar's written statement was inadmissible as a prior consistent statement because it did not meet the requirements of Rule 801(e)(1)(B).

The record reflects the State offered Tovar's written statement in response to appellant's contention that Tovar did not remember speaking to the police the day after the offense. However, appellant's position regarding Tovar's failure to recall her conversations with the police does not qualify as "an express or implied charge of recent fabrication or improper influence or motive." In her trial testimony Tovar did not deny making the recorded oral statements to police, rather, she stated that she did not remember what she told the officers. Appellant offered Tovar's recorded oral statement to show that she did in fact make the statements. Because appellant did not charge the witness with fabrication, improper influence or motive, or impeach the witness concerning whether she made the recorded oral statement to police, Tovar's written statement did not meet the requirements of Rule 801(e)(1)(B). Introduction of the written statement constituted improper "bolstering" of the witness and the trial court abused its

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[27] Appellant also claims the written statement was inadmissible because it contains references to "several unadjudicated prior offenses allegedly committed by" him. Appellant made an objection on this ground at trial after the trial court ruled the evidence was admissible. A defendant must make a timely objection in order to preserve an error in the admission of evidence. Because appellant's objection was untimely, he has not preserved error on this particular ground. Tex. R. App. P. 52(a); Dinkins, 894 S.W.2d at 355.

discretion in admitting it. See Tex. R. Crim. Evid. 612(c); Anderson v. State, 633 S.W.2d at 855; Hulin v. State, 438 S.W.2d 551, 552 (Tex. Crim. App. 1996); GOODE, WELLBORNE, & SHARLOT, TEXAS PRACTICE § 801.4, at 104 (2nd ed. 1993).

Appellant also argues the statement was not admissible under Rule 106. Rule 106 provides, in pertinent part:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may at that time introduce any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

The purpose of this Rule is to prevent any confusion or false impression that may be created by introducing only a portion of a writing or recorded statement. We have interpreted Rule 106 to permit other portions of a writing or recorded statement that relate to the same subject relied upon by the party introducing the evidence. See Roman v. State, 503 S.W.2d 252, 253 (Tex. Crim. App. 1974).

As discussed above, the State offered Tovar's written statement in response to appellant's introduction of Tovar's recorded oral statement. As the trial court put it "these matters [in the written statement] are obviously being admitted because of the circumstances that have arisen with the admission of Defendant's Exhibit 109 [the recorded oral statement] and they wish to offer another statement relating writings [sic] and that comes in under Rule 106." However, Tovar's written statement did not address whether or not Tovar made the recorded oral statement to the police, and as such, it cannot be said to either relate to the recorded oral statement or to clear up any confusion caused by the introduction of the recorded oral statement. Hence, it was error for the trial court to admit Tovar's written statement under either Rule 801(e)(1)(B) or Rule 106.

Finding error, we must now determine whether the error was harmless beyond a reasonable doubt. Tex. R. App. P. 81(b)(2); see Harris v. State, 790 S.W.2d 568 (Tex. Crim. App. 1989). Unless it can be determined beyond a reasonable doubt that the error made no contribution to the conviction or to the punishment, the judgment

must be reversed. Miles v. State, 918 S.W.2d 511, 516 (Tex. Crim. App. 1996). When conducting a harm analysis, we look at the totality of the record. Griffin v. State, 779 S.W.2d 431, 433 n.2 (Tex. Crim. App. 1989). As an appellate court, we calculate as much as possible the probable impact of the error on the jury in light of the existence of the other evidence. Harris, 790 S.W.2d at 587. If the court rules that an error is harmless it is in essence asserting that the nature of the error is such that it could not have affected the jury. Id.

Nicholas Cortez, the only other witness besides Tovar to survive the offense, was called by the State to testify about what happened the night of the murders. His testimony was consistent with Tovar's written statement.[28] Cortez had gone to Tovar's home to visit her husband. He testified that Tovar's daughter-in-law opened the door and that a man was standing next to her holding a gun to her head. Cortez identified appellant as the man holding the gun. Cortez stated that he went into the house, was tied up, and was placed in one of the bedrooms. He testified that he heard a woman scream and several gun shots. Then, Cortez testified, he was shot in the head. Appellant did not object to Cortez's testimony.

Cortez's trial testimony was similar to Tovar's written statement. Significantly, his testimony regarding appellant's participation in the offense was consistent with Tovar's written statement and his testimony was given without any objection from appellant. We have held that "inadmissible evidence can be rendered harmless if other evidence at trial is admitted without objection and it proves the same fact that the inadmissible evidence sought to prove." Mayes v. State, 816 S.W.2d 79, 88 (Tex. Crim. App. 1991) (quoting Anderson v. State, 717 S.W.2d 622, 628 (Tex. Crim. App. 1986), cert. denied, 110 S.Ct. 3232 (1990)). We find that the error in admitting Tovar's written statement was

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[28] In her written statement, Tovar described the events leading up to the offense, as well as the details of the offense itself. She identified appellant as one of the perpetrators and discussed his participation in the murders.

harmless in light of Cortez's trial testimony, which was admitted without objection and established the same evidence. Point of error forty-two is overruled.

Appellant avers in his forty-sixth and forty-seventh points of error that the trial court erred in sustaining the State's objection to testimony that appellant would be required to serve a minimum of 35 years in prison before becoming eligible for parole and overruling his requested jury charge on the same topic. We have already addressed these issues on a number of occasions and held contrary to appellant's position. Appellant has given us no reason why these cases should not control in the instant case. Smith v. State, 898 S.W.2d 838 (Tex. Crim. App.), cert. denied, 116 S.Ct. 131 (1995); Willingham v. State, 897 S.W.2d 351 (Tex. Crim. App.), cert. denied, 116 S.Ct. 385 (1995); Broxton v. State, 909 S.W.2d 912 (Tex. Crim. App. 1995); Sonnier v. State, 913 S.W.2d 511 (Tex. Crim. App. 1995); Lawton v. State, 913 S.W.2d 542 (Tex. Crim. App. 1995). Points of error forty-six and forty-seven are overruled.

Finding no reversible error, we affirm the judgment of the trial court.

Maloney, J.

Delivered December 18, 1996
Do Not Publish

McCormick, P.J., concurs in the result.

Clinton and Overstreet, J.J., dissent.

White, J., not participating.

APPENDIX B

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITAL STATION, AUSTIN, TEXAS 78711

TEXAS

Fe[illegible]ary 26, 1997

[illegible] DISTRICT COURT-636535

RE: Case No. 71,817

STYLE: BROWN, ARTHUR, JR.

[illegible]day the Appellant's Motion for Rehearing was denied.

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Troy C. Bennett, Jr., Clerk

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Supreme Court, U.S.
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No. 96-9187

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1996

ARTHUR BROWN, JR,
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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31 pp

QUESTIONS PRESENTED

1. **WHETHER THE TRIAL COURT VIOLATED BROWN'S RIGHTS UNDER THE FOURTEENTH AND EIGHTH AMENDMENTS WHEN IT REFUSED TO INFORM THE JURY DURING VOIR DIRE OR THE PUNISHMENT PHASE THAT BROWN, IF GIVEN A LIFE SENTENCE WOULD NOT BE ELIGIBLE FOR PAROLE FOR THIRTY-FIVE (35) YEARS?**

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No. 96-9187

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1996

ARTHUR BROWN, JR.
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES Respondent,[1] the State of Texas, by and through the Attorney General of Texas, and files this Brief in Opposition.

OPINION BELOW

The unpublished opinion of the Texas Court of Criminal Appeals affirming Brown's conviction and sentence is attached to Brown's petition as Appendix A. *Brown v. State*, No. 71, 817 (Tex. Crim. App. December 18, 1996). Brown's motion for rehearing was

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[1] For clarity, the respondent will be referred to as "the State" and petitioner Arthur Brown, Jr. as "Brown."

denied by the lower court on February 26, 1997. *See* Petition for Writ of Certiorari at Appendix B (hereinafter "Petition").

JURISDICTION

Brown seeks to invoke this Court's jurisdiction under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Brown bases his claims upon the Eighth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

1. Trial

The Director has lawful custody of Brown pursuant to the judgment and sentence of the 351st District Court of Harris County, Texas, in Cause Number 636535, styled *The State of Texas v. Arthur Brown, Jr.*. The State indicted Brown for the capital offense of murder of more than one person during the same transaction, namely, the deaths of Jessica Quinones, Jose Guadalupe Tovar, Audrey Brown, and Frank Farias, by shooting the complainants with a deadly weapon, namely a firearm. To the charge, Brown entered a plea of "not guilty." 27 SR 16.[2] On November 19, 1993, a jury found Brown "guilty" of the

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[2] "SR" refers to the statement of facts of the state court record, preceded by volume number and followed by page numbers. "Tr" refers to the transcript of the state record of Brown's trial, preceded by volume number with citation to applicable page numbers.

capital offense. 39 SR 153. Following a punishment hearing on that same date, the jury answered the first two special issues affirmatively and the mitigation issue negatively and Brown was sentenced to death.[3] 40 SR 151-55.

2. *Direct appeal*

Brown's conviction and sentence were automatically appealed to the Texas Court of Criminal Appeals. On December 18, 1996, that court affirmed his conviction in an unpublished opinion. *Brown v. State*, No. 71, 817 (Tex. Crim. App. December 18, 1996). On May 27, 1997, this petition for writ of certiorari followed.

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[3] The punishment phase issues read as follows:

SPECIAL ISSUE NO. 1

Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Arthur Brown, Jr., would commit criminal acts of violence that would constitute a continuing threat to society?

SPECIAL ISSUE NO. 2

Do you find from the evidence that Arthur Brown, Jr., the Defendant himself, actually caused the death of Jessica Quinones and Jose Guadalupe Tovar and Audrey Brown and Frank Farias intending on killing or if he did not actually cause their death that he intended to kill Jessica Quinones and others and that he anticipated that human life would be taken?

SPECIAL ISSUE NO. 3

Taken into consideration all the evidence including the circumstances of the offense the Defendant's character and background and the personal moral culpability of the Defendant do you find a sufficient mitigating circumstance or circumstances that would warrant that a sentence of life in prison rather than a death sentence be imposed? The jury however need not agree on what particular evidence the Court affirmatively finds on this Special Issue.

40 SR 150-52; *see also* Tex. Code Crim.Proc.Ann. art. 37.071 (West 1997).

B. Statement of Facts

1. The guilt-innocence phase

On the evening of June 20, 1992, at approximately 11:00 p.m., Cedric Chandler, a fireman, and a crew of five other firemen, were dispatched to a home at 4631 Brownstone in Houston, Texas. 27 SR 48-50. When Chandler arrived he found a bloody carnage. 27 SR 52. Chandler was first approached by a man covered in blood who had apparently suffered a gunshot wound to the head. 27 SR 52. The injured man directed Chandler toward other victims strewn about the house. 27 SR 54. In the bathroom, Chandler observed two women (one who was eight months pregnant) tied up, lying on the floor, and shot in the head; at that time, both women were still breathing. 27 SR 55, 77. Chandler then went into a bedroom and discovered a man lying on the floor, tied up and shot in the head. 27 SR 57-58. This man had no pulse. 27 SR 58. In another bedroom, Chandler found another woman tied up and lying on the floor, face down in a pool of blood; she had been shot in the head but was still breathing. 27 SR 59. In that same room was another man, lying on the side of the bed, tied up with a gunshot wound to the head. 27 SR 59. He too had a pulse. 27 SR 60. In all, the crime scene revealed an "execution style killing" with very "few signs of struggle." 27 SR 277. Only two of the victims survived.

One of the survivors was Rachel Tovar. At trial, Rachel testified that her husband, Jose, was a drug dealer who sold "bulk drugs, marijuana and cocaine" and that she ultimately got involved with drug dealing herself. 31 SR 130. Rachel then recounted that

on June 20, 1992, Jose had asked her to contact some customers of his and inform them that he had cocaine to sell. 31 SR 132. Two of these customers were Arthur Brown and Marion Dudley. 31 SR 137. Rachel contacted the two men despite a previous argument she had had with Dudley regarding pricing. 31 SR 138 ([Rachel Tovar:] "he was trying to get a lower price on the deal that they were doing . . . and my husband had told me one price and he wanted it lower.")

That afternoon, at approximately 3:00 p.m., Brown, Dudley and another man, Tony Dunson, arrived at the Tovar house in a beige mini-van. 31 SR 143. The men had a brief conversation with Jose, who informed them that he would have three kilos of cocaine available for sale later in the evening. 31 SR 165. Hearing this, Brown, Dunson, and Dudley left the Tovar's house intending to return later. 31 SR 165. At approximately 9:30 p.m., the men returned, and Jose took them into a back bedroom. 31 SR 168. Shortly thereafter, Rachel, who had been visiting her next door neighbor (Ned Bervis), returned home and encountered Dunson pointing a gun at her. 31 SR 183. Rachel could also hear Dudley yelling at her husband in the back bedroom. 31 SR 178. Dunson ordered Rachel to close and lock the door, he also ordered her into the back bedroom. 31 SR 184. Once there, Rachel saw Dudley pointing a gun to her husband's head and yelling at him, "you stupid Mexican, I never did like you, it's your fault they killed . . . my little brother." 31 SR 186. Rachel had no idea what Dudley was talking about. 31 SR 186.

In the same bedroom were Rachel's daughter-in-law, Jessica, her neighbor Audrey, and her son Frank. 31 SR 186. Shortly after Rachel's arrival, Brown appeared with a kitchen knife and began cutting a bed sheet into strips. 31 SR 187. Soon thereafter, Audrey "told the [men that] she didn't know what was going on," and asked if she "could please leave." 31 SR 192. Dudley responded, "you stupid bitch, you shouldn't have been here." 31 SR 192. Next, Jessica, who was pregnant, began feeling faint and Dudley shouted at her, "you better not go into labor on me." 31 SR 192.

While Dudley was shouting, Brown tied up Frank and Audrey with strips of the bed sheet. 31 SR 193. He then tied up Rachel and placed her in another bedroom and shut the door. 31 SR 194. While there, Rachel heard the doorbell and Jessica's voice as she answered the door. 31 SR 195. Rachel recognized the visitor's voice as Nicholas Anzures, a friend of the Tovar family. Anzures had been greeted by Jessica and a man Anzures later identified as Brown holding a gun to Jessica's head and threatening to kill her. 31 SR 17-18. Brown ordered Anzures into the bedroom with Jose, Audrey, and Frank, and Dudley and Dunson tied him up, gagged him, and laid him on the bed. 31 SR 21.

Shortly thereafter, Brown ordered Jessica into the other bedroom with Rachel. 31 SR 196. Jessica was told to gag Rachel with a piece of bed sheet. 31 SR 197. Next, Rachel heard "somebody struggling to scream" and "two gunshots." 31 SR 197. The next thing that Rachel remembered was that he was "out;" she had been shot by one of the three men. 31 SR 197. When she regained consciousness, Rachel struggled to her feet and began looking

for Jessica and Frank to see if they were alright. 31 SR 198. She found her husband, dead; Anzures injured; Frank, fatally wounded; Jessica, fatally wounded; and Audrey, fatally wounded. 31 SR 199-200. Rachel then crawled out of her house and went to the house next door and told Ned Bervis to call the police. 31 SR 201.

Based on Rachel's description of the events, as well as accounts from other witnesses, the identity of the suspects and their location was easily discovered. 27 SR 305. As a result, warrants for the arrests of Arthur Brown, Marion Dudley, and Tony Dunson were issued and subsequently executed. 27 SR 307-012. Direct and ballistics evidence later revealed that Brown had shot four of the six victims, including Jessica who was eight months pregnant. 31 SR 11-122; 33 SR 179, 279-329; *see also* 40 SR 136.

2. The punishment phase

Jason Mooney, a retired night manager of Shoney's Motel testified that four years previously he had been robbed at gun point by two men who repeatedly threatened to kill him. 40 SR 12-18. Although Mooney could not identify the robbers, he did testify that he had subsequently learned that an arrest had been made. 40 SR 20. In conjunction with Mooney's testimony, the State introduced a certified copy of court records revealing that Brown had been convicted of the offense. *See* State's Exhibit 83.

Matthew Sklar testified next. 40 SR 29. Sklar shared the same cell block with Brown in March 1993 and described how Brown "r[an] the cell block" demanding rent "for staying in his house." 40 SR 31. If you did not pay Brown the money that he had demanded, Sklar

recounted, Brown would fight you. 40 SR 33. Sklar testified that he did pay Brown and felt "like a piece of dirt because of it." 40 SR 34. Sklar ultimately reported the problem to a jailor.

Next, the State offered the testimony of Carlos Lopez, a deputy for the Harris County Sheriff's Department who investigated Sklar's extortion claims. 40 SR 43-45. Deputy Lopez testified that while he was questioning the inmates in Brown's cell block he heard a commotion. 40 SR 47. Walking out into the hallway where Brown was being detained, Deputy Lopez observed Brown "pushing and knocking down [another] [d]eputy" and repeatedly striking him. 40 SR 49. Lopez immediately went to assist the deputy, pushed Brown off him and handcuffed Brown. 40 SR 48. Brown was then removed from the cell block. 40 SR 50.

Deputy Harry Mitchell confirmed Lopez's account; he was the deputy assaulted by Brown. 40 SR 61. Deputy Mitchell testified that before he and Deputy Lopez began questioning Brown's cell block mates, Mitchell ordered Brown out into the hallway with his face to the wall. 40 SR 66. Mitchell then testified that, although Brown went into the hallway, he refused, after repeated requests, to face the wall. 40 SR 67. Deputy Mitchell ultimately grabbed Brown by the arm and shoulders in an attempt to push Brown against the wall. Brown resisted and hit Deputy Mitchell in the eye. 40 SR 69. When Deputy Mitchell fell to the floor as a result of the blow, Brown kept hitting him until restrained by Deputy Lopez. 40 SR 69.

The only testimony offered by Brown was that of Peter Lewis, a law professor at South Texas College of Law. 40 SR 94. Professor Lewis testified as to the phenomenon known as "maturational reform." 40 SR 98. Specifically, Professor Lewis testified that "maturational reform" is a "study that indicates over a period of time that violent offenders, if they're violent in their youth, over time tend to become less and less violent as function of time." 40 SR 98. Professor Lewis further testified that "a structured environment such as custody does seem to play an important factor in this decrease in violence." 40 SR 114.

REASONS FOR DENYING THE WRIT

I.
THE QUESTIONS PRESENTED FOR REVIEW ARE UNWORTHY OF THIS COURT'S ATTENTION.

Rule 10 of the Rules of the Supreme Court provides that review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only for compelling reasons. Brown advances no compelling reason in this case, and none exist. Further, the issues in this case involve only the application of established constitutional principles to the facts. Thus, the petition presents no important question of law to justify this Court's exercise of its certiorari jurisdiction.

II.

BROWN'S CONSTITUTIONAL RIGHTS WERE NOT VIOLATED BY THE TRIAL COURT'S REFUSAL TO INFORM THE JURY DURING VOIR DIRE OR THE PUNISHMENT PHASE THAT BROWN, IF GIVEN A LIFE SENTENCE, WOULD NOT BE ELIGIBLE FOR PAROLE FOR THIRTY-FIVE YEARS.

Brown claims that the trial court violated his rights to due process, equal protection, and his rights under the Eighth Amendment when it refused to permit questioning during voir dire, evidence during the punishment phase, and an instruction in the sentencing charge concerning the fact that if convicted of capital murder and sentenced to life in prison, Brown would have to serve 35 years before becoming parole eligible. In support of these separate but related arguments, Brown relies on this Court's opinion in *Simmons v. South Carolina*, 512 U.S. 154 (1994), and claims that its holding concerning a defendant's legal ineligibility for parole should be extended to facts such as these where a defendant is factually ineligible for parole for at least thirty-five years. But Brown's claims are without merit. Brown has failed to present this Court with any rational, constitutionally viable reason for extending *Simmons* to the current facts.

A. The Fourteenth Amendment Does Not Require That a Capital Jury Be Informed of a Defendant's Factual Ineligibility for Parole.

1. Due process

In *Simmons v. South Carolina*, 512 U.S. 154 (1994) (plurality opinion), the Court addressed a capital defendant's right to inform his jury of the parole implications of a life

sentence under the due process clause of the Fourteenth Amendment. There, the Court held that a capital defendant has a due process right to inform the jury of his *legal ineligibility* for parole where: (1) life without the possibility of parole is the alternative to a death sentence, and (2) future dangerousness is a sentencing inquiry. *Id.* at 156-57 (plurality opinion); *id.* at 182 (O'Connor and Kennedy, JJ., concurring). The concern underlying the *Simmons* holding is that jurors reasonably could be expected to believe that a defendant sentenced to life imprisonment would be eligible for parole at some point, and the absence of an instruction or other information about the defendant's parole ineligibility was misleading--particularly in light of the government's evidence and argument that Simmons posed a future danger to elderly women in "free" society. *Id.* at 165-67 (plurality); *see also id.* at 157-59.

The holding of *Simmons*, however, does not apply to states such as Texas where life without parole is not a sentencing option in capital cases. *See id.* at 165-66 (noting that, while Texas traditionally has prohibited informing juries about a capital defendant's parole eligibility, life without parole is not a sentencing alternative in Texas).

> In a State in which parole is available, how the jury's knowledge of parole eligibility will affect the decision whether or not to impose the death penalty is speculative, and we shall not lightly second-guess a decision whether or not to inform the jury of information regarding parole.

Id. at 168 (plurality opinion). Thus, the language of *Simmons* itself makes clear that the case did not invalidate Texas' prohibition against informing juries about the parole implications of a life sentence in capital cases.

And Brown's suggestion that a failure to invalidate this Texas' prohibition prevents a defendant from presenting "truthful" information to the jury should be rejected. Petition at 12. As the *Simmons* Court made clear, the "logic and effectiveness of petitioner's argument [in that case] naturally depended on the fact that he was legally ineligible for parole." *Id.* at 164-65. In other words, a capital defendant's legal ineligibility for parole must be a matter of law because evidence of such ineligibility is inherently "truthful," and allows the defendant to deny or explain the state's case for future dangerousness. *Id.* at 168. "But if a defendant's ineligibility is a matter of fact, *i.e.*, the defendant probably will not be eligible for parole, then the evidence is purely speculative (maybe even inherently 'untruthful') and therefore cannot positively deny future dangerousness." *Allridge v. Scott*, 41 F.3d 213, 222 (5th Cir. 1994), *cert. denied* 514 U.S. 1108 (1995). The jury is left only to speculate about what a parole board may, or may not do thirty-five years hence. In *Simmons*, the Court, relying on *California v. Ramos*, 463 U.S. 992, 1014 (1983), reaffirmed that states can properly choose to prevent a jury from engaging in such speculation as a means of

providing greater protections in their criminal justice systems than constitutionally required.[4] *Id* (citing *Ramos*, 463 U.S. at 1014.)

Finally, application of *Simmons'* legal ineligibility for parole holding to the present facts would be misguided as the concept of future dangerousness as recognized in Texas' capital-sentencing scheme, and as presented to the jury in the instant case, is distinguishable from the concept of future dangerousness argued by the South Carolina prosecutor in *Simmons*. The prosecutor in *Simmons* "urge[d] the jury to sentence the defendant to death so that he [would] not be a danger to the public if released from prison." *Simmons*, 512 U.S. at 162. Under the Texas scheme, in contrast, a prosecutor urges a jury to answer in the affirmative a specific question, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." Tex. Code Crim. Proc. Ann. art. 37.071 § 2(b)(1). Texas courts have defined "society" in this context to include both prison and non-prison populations. *Jones v. State*, 843 S.W.2d 487, 495 (Tex. Crim. App. 1991), *cert. denied*, 507 S. Ct. 1035 (1993); *Boyd v. State*, 811 S.W.2d 105, 118 n.12 (Tex. Crim. App.), *cert. denied*, 502 U.S. 971 (1991). Thus, even if Texas had

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[4] Indeed, it is far from clear that informing the jury of early release and parole is beneficial to capital defendants. In *Ramos*, for example, the defendants complained that such information biased the jury in favor of death. *Ramos*, 463 U.S. at 1010-11. In *King v. Lynaugh*, 850 F.2d 1055, 1061 (5th Cir. 1988) (en banc), *cert. denied*, 488 U.S. 1019 (1989), the Fifth Circuit observed that knowledge that a capital murderer could be released from prison in twenty years is not necessarily likely to reassure jurors and, in fact, might incline them to impose the death sentence. It is precisely because the issue is so speculative that this Court concluded in *Simmons* that whether to inform juries of parole consequences is a decision better left to the states. *Simmons*, 512 U.S. at 168-69.

the "life without parole" sentencing alternative to the death penalty as seen in *Simmons*, this case would be distinguishable because the prosecutor's argument in *Simmons* would be accurate under Texas' definition of "society." Accordingly, Brown's attempt to minimize the difference between legal and factual ineligibility for parole — "the sole difference between life without possibility of parole and life without parole is a degree" -- is of no help to him in this State. Unless one is willing to assume, improperly, that Brown had a constitutional right to undervalue the prison population *vis a vis* society at large, the degree of difference between factual ineligibility parole versus legal ineligibility for parole is too substantial to warrant the due process relief that Brown requests.

2. Equal protection.

Likewise, Brown's equal protection argument must fail. More particularly, there is no legal basis for Brown's assertion that the State unconstitutionally discriminates between capital and non-capital defendants because juries in non-capital cases are informed of the details regarding a defendant's eligibility for parole. *See* Petition at 15.

Under the Equal Protection Clause of the Fourteenth Amendment, when a classification does not implicate a fundamental right, or operate to the detriment of a suspect class, the proper standard for review is to determine whether there is a rational basis for the different treatment, which is to say, whether the classification bears a rational relationship to a legitimate state interest. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 440 (1985); *Clements v. Fashing*, 457 U.S. 957, 963 (1982); *City of New Orleans v. Dukes*,

427 U.S. 297, 303 (1976). "Rational basis" review is highly deferential towards the states when economic or social legislation is at issue. *Dallas v. Stanglin*, 490 U.S. 19, 26-27 (1989); *Cleburne*, 473 U.S. at 440. Courts also defer to penal legislation. *See McGowan v. Maryland*, 366 U.S. 420, 422-428 (1961). Accordingly, this Court should not strike down a classification unless it is "based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds can be conceived to justify them." *Clements*, 457 U.S. at 963.

Brown cites no authority to support the proposition that the State's decision to refrain from informing a capital sentencing jury of the number of years he would have to serve before becoming eligible for parole implicates a fundamental constitutional right. *See Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (noting fundamental substantive rights are those such as the right to marriage and procreation); *see also Simmons*, 512 U.S. at 168 (noting that states in which parole is available may reasonably decide to keep such sentencing information from capital sentencing jury). Nor does Brown provide argument or authority for the proposition that capital murderers constitute a suspect class that will justify strict scrutiny. This Court has never recognized criminal defendants in general, or capital defendants in particular, as constituting a suspect class. Thus, Brown's equal protection claim is properly reviewed under the "rational basis" standard.

Under section 4 of article 37.07 of the Texas Code of Criminal Procedure, Texas courts have consistently instructed juries in non-capital cases with respect to a defendant's eligibility

for parole and certain calculations relevant to parole guidelines, but do not do so in capital cases. However, there are persuasive, logical reasons for the State to allow a jury to consider parole in non-capital cases but to preclude it from doing so in capital cases. The sentencing procedures in capital and non-capital cases are distinctly different. In non-capital cases, the sentencer is free to assess any sentence that is within the range delineated by statute. TEX. CODE CRIM. PROC. ANN. art. 37.07; *see also* TEX. PENAL CODE ANN. §§ 12.31,12.34 (specifying ranges of punishment for classes of felony offenders). Thus, in non-capital cases, the jury decides the specific term of years for which the defendant will be incarcerated. The period of time a non-capital defendant will actually serve in jail is effected, however, by parole laws. Given this circumstance, it is appropriate for the jury to be aware of the parole process and to take it into consideration in making a decision as to the term of years the defendant should serve.

In capital cases, on the other hand, the jury's discretion is guided by its consideration of the special issues, and it is the responses to the special issues that determine punishment in a particular case. TEX. CODE CRIM. PROC. ANN. art. 37.071. The special issues focus the jury on the gravity of the offense and the defendant's propensities for violent crime. The special issues require the jury to focus on the defendant's background and character and the circumstances of the crime, without injecting into the process speculation about whether, and if so when, the defendant might be released on parole if he were given a life sentence. Indeed, for a jury to be instructed on the ramifications of parole law could well work to the

disadvantage of a capital defendant, for the jury would be made explicitly aware that a life sentence does not necessarily mean life. *See King*, 850 F.2d at 1061 (knowledge that a capital murderer released from prison in twenty years is not necessarily likely to reassure jurors and, in fact, might incline them to impose a death sentence.) Accordingly, the State's differing treatment of capital and non-capital defendants did not violate Brown's equal protection rights.

B. The Eighth Amendment does not require that a Capital Jury be Informed of a Defendant's Factual Ineligibility for Parole.

As an initial matter, the general relevance or admissibility of evidence, whether it be at the guilt/innocence or punishment phase of trial, does not implicate Eighth Amendment concerns. Rather, this issue is properly analyzed in the context of the Due Process clause of the Fourteenth Amendment. *See Romano v. Oklahoma*, 512 U.S. 1, 10 (1994) (rejecting petitioner's attempt to "fashion general evidentiary rules under the guise of the Eighth Amendment, which would govern the admissibility of evidence at capital sentencing proceedings."); *Skipper v. South Carolina*, 476 U.S. 1, 11 (1986) (Powell, J., joined by Burger, C.J., and Rehnquist, J., concurring) (noting that "the States, and not this Court, retain 'the traditional authority' to determine what particular evidence within the broad categories described in *Lockett* [*v. Ohio*, 438 U.S. 586 (1978) (plurality opinion)] and *Eddings* [*v. Oklahoma*, 455 U.S. 104 (1982)] is relevant in the first instance.") As in *Skipper*, this Court chose to resolve the capital-sentencing issue in *Simmons* on the basis of due process rather

than the Eighth Amendment. *See Skipper*, 476 U.S. at 11; *see also Gardner v. Florida*, 430 U.S. 349 (1977). The *Simmons* Court expressly declined to opine whether the result reached was also compelled by the Eighth Amendment. *Simmons*, 512 U.S. at 161 n.4.

Further, there is no basis for speculating that, in this context, Eighth Amendment protections extend beyond those of due process. Quite the contrary, the Court's Eighth Amendment jurisprudence with respect to evidentiary matters has, heretofore, been limited to identifying the classes or types of potentially mitigating evidence to which the jury must be allowed to give mitigating effect and the procedures that are sufficient for this purpose. *California v. Ramos*, 463 U.S. 992, 999 (1983) (noting that, in construing the Eighth Amendment, the Court primarily has been concerned with procedures by which states impose death sentences and not substantive factors juries are allowed to consider). In particular, the Eighth Amendment requires that "'the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death.'" *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (emphasis in original), *quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion). *Lockett* and *Eddings* reflect the view that a capital defendant, like a non-capital defendant, is entitled to an individualized sentencing decision that is a reasoned moral response to the defendant's personal culpability. *E.g.*, *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989); *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (O'Connor, J., concurring); *California v. Brown*, 479 U.S. 538, 545 (1987). Once a

defendant has been determined to be "eligible" for the death sentence, the Eighth Amendment requirements for the "selection" or individualized sentencing determination are satisfied if the procedures "allow the jury to consider the character and record of the defendant and the circumstances of the crime." *Tuilaepa v. California*, 512 U.S. 967, 973 (1994); *see also Saffle v. Parks*, 494 U.S. 484, 494 (1990). Further, the Court has held that "there is no . . . constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Boyde v. California*, 494 U.S. 370, 377 (1990), *quoting Franklin*, 487 U.S. at 181 (plurality opinion).

The Eighth Amendment issue raised by Brown does not involve, however, the admission or exclusion of any of these categories of potentially relevant mitigating evidence; the state's parole laws are not in any way part of Brown's character, his record, or the circumstances of his offense. *See Smith v. State*, 898 S.W.2d 838, 853 (Tex. Crim. App.) (the state's parole laws are not in any way part of a capital defendant's character, record, or circumstances of the offense), *citing Ramos*, 463 U.S. at 1021 (Marshall, J., dissenting), *cert. denied*, 116 S. Ct. 131 (1995). Further, a parole instruction in no way relates to Brown's culpability and, therefore, could not render him less *deserving* of the death penalty. In other words, if the purpose of an individualized sentencing determination is to distinguish between people who deserve the death penalty and those who do not, *see Eddings*, 455 U.S. at 112, then evidence of a parole law that applies to an entire class of capital defendants would not

further this purpose. Thus, Brown has failed to demonstrate how informing the jury on the applicable parole law would have promoted an individualized sentencing determination that death was or was not "the appropriate punishment" in his case. *Lockett*, 438 U.S. at 601. Whether death was an appropriate punishment in this case has nothing to do with Texas parole law, but rather, with whether Brown was more deserving of the death penalty, based on his character, record and circumstances of his offense, than any other capital murder defendant. Therefore, Brown has not shown that the state limited his ability to present constitutionally mitigating evidence at the punishment phase of his trial.

Nor is there a reasonable likelihood that the absence of such an information/evidence, *i.e.*, that Brown could not be paroled for thirty-five years, precluded the jury from effectively considering the mitigating evidence that was presented. Brown contends that an instruction or evidence about his parole eligibility was necessary in order to allow the jury to consider his mitigating evidence that, if credited, indicated that his violent tendencies could diminish over time. But evidence that Brown would outgrow his violent tendencies, if credited, possessed mitigating relevance to the second special issue. *Graham v. Collins,* 506 U.S. 461, 476 (1993). That the jury answered the future dangerousness issue "yes" does not reflect that it was precluded from effectively considering Brown's evidence but, rather, that the remote possibility that Brown might not always be a violent person was insufficient to raise a reasonable doubt that he would pose a continuing threat to society, including prison society.

Finally, Brown's attempt argue that the lower courts need guidance on this issue is wholly without support. He acknowledges that "Texas and the Fifth Circuit consistently have read *Simmons* narrowly as applying only to cases involving life-without-parole as an alternative to the death penalty situations," but he then tries to show a conflict with these decisions by citing one New Mexico Supreme Court case in which the court, *clearly* in *dicta*, stated it agreed with Justice Souter's Eighth Amendment analysis of the issue in his *Simmons* concurring opinion. Petition at 15. *See also Clark v. Tansy*, 882 P.2d 527, 531 (N.M. 1994) ("[B]ecause *Simmons* points to a resolution of Clark's habeas petition on due process grounds, and because we hesitate to decide his petition according to the very Eighth Amendment principles on which a majority of the Supreme Court specifically declined to express an opinion, we do not decide Clark's petition under the 'cruel and unusual punishment' provision of the Eighth Amendment . . . .") But one case does not a "conflict" make in terms of this Court's discretion to grant review. Furthermore, as demonstrated, the *Clark* court specifically did not render a holding on this issue. *Clark*, 882 P.2d at 531. Accordingly, Brown has not demonstrated any need for guidance from this Court regarding the *Simmons* analysis.

Brown's Eighth Amendment argument must be rejected.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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ATTORNEY GENERAL

August 26, 1997

The Honorable William K. Suter
Clerk, United States Supreme Court
Office of the Clerk
1 First Street, N.E.
Washington, D.C. 20543

Re: *Arthur Brown, Jr. v. The State of Texas*
No. 96-9187

Dear Mr. Suter:

Enclosed for filing with the papers in the above styled cause are the original and nine copies of Respondent's Brief in Opposition. Also enclosed is the Proof of Service Form. Please indicate the date of filing on the enclosed copy of this letter and return it to me in the post-paid envelope provided.

By copy of this letter, I am forwarding a copy of said brief to counsel for Petitioner.

Thank you for your kind assistance in this matter.

Yours truly,

ELIZABETH A. MARTIN
Assistant Attorney General
(512) 936-1600

EAM/jgw
Enclosures
c: Tom Moran
11 Greenway Plaza, #3112
Houston, Texas 77046

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No. 96-9187

IN THE UNITED STATES SUPREME COURT

OCTOBER TERM, 1996

ARTHUR BROWN, JR,
Petitioner,

v.

THE STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To the Texas Court of Criminal Appeals

PROOF OF SERVICE

I hereby certify that on the 26th day of August, 1997, one copy of **RESPONDENT'S BRIEF IN OPPOSITION** was mailed, postage prepaid, to Tom Moran, 11 Greenway Plaza, #3112, Houston, Texas 77046. All parties required to be served have been served. I am a member of the Bar of this Court.

MARGARET PORTMAN GRIFFEY
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ATTORNEY FOR RESPONDENT

SUPREME COURT OF THE UNITED STATES

ARTHUR BROWN, JR. *v.* TEXAS

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

No. 96–9187. Decided October 20, 1997

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS, with whom JUSTICE SOUTER, JUSTICE GINSBURG, and JUSTICE BREYER join, respecting the denial of the petition for a writ of certiorari.

In Texas, although juries are required to assess a capital defendant's "future dangerousness" before sentencing him to death, he is prohibited from presenting truthful information to the jury about when he would be eligible for parole if sentenced to life. In the present case, the petitioner would have been required to spend 35 years in prison before becoming eligible for parole if he had been sentenced to life imprisonment.[1] He sought to present this truthful information to the jury, coupled with evidence that people become less dangerous over time. He was prohibited from doing so by Texas law.

There is obvious tension between this rule and our basic holding in *Simmons* v. *South Carolina*, 512 U. S. 154 (1994). As JUSTICE SCALIA correctly observed, a logical application of that holding would permit "the admission of evidence showing that parolable life-sentence murderers are in fact almost never paroled, or are paroled only after age 70; . . . or evidence showing that, though under cur-

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[1]Texas has since amended its parole law: A prisoner sentenced to life imprisonment for a capital felony is now ineligible for parole for at least 40 years. Tex. Code Crim. Proc. Ann., Art. 42.18, §8(b)(2) (Vernon Supp. 1997).

rent law the defendant *will* be parolable in 20 years, the recidivism rate for elderly prisoners released after long incarceration is negligible." *Id.*, at 184–185 (dissenting opinion); see also *id.*, at 172–174 (SOUTER, J., concurring).[2]

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[2]Poll data from various States supports the conclusion that full information would have an impact on jurors' decisionmaking. In Nebraska, for example, although 80.4% of people support capital punishment in the abstract, only 51.6% prefer the death penalty when the alternative is life imprisonment when the defendant would be ineligible for parole for 25 years. See Bowers, Vandiver, & Dugan, A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer, 22 Am. J. Crim. L. 77, 101, 105 (1994). Indeed, support for the death penalty dropped in each State when life imprisonment was presented as an alternative, when the defendant would be parole ineligible for 25 years. See *id.*, at 89–90 (support for death penalty dropped from 77% to 62% in Arkansas, from 64% to 45% in Virginia, and from 75% to 53% in Georgia when alternative was life imprisonment when defendant would be parole ineligible for 25 years). Not surprisingly, the death penalty becomes even less attractive as the length of parole ineligibility increases. See *id.*, at 105 (while 51.6% of people in Nebraska prefer the death penalty when the alternative is life imprisonment when defendant would be parole ineligible for 25 years, only 46.4% prefer the death penalty when defendant would be parole ineligible for 40 years).

The poll data also supports the argument that the life-without-parole option considered in *Simmons* is different in degree, but not in kind, from the sentencing options at issue here, see *Simmons*, 512 U. S., at 184–185 (SCALIA, J., dissenting). In Georgia, for example, while 75% of people support the death penalty in the abstract, support for the death penalty drops to 53% when a defendant would be parole ineligible for 25 years, and to 46% when a defendant would never be eligible for parole. See Bowers, 22 Am. J. Crim. L., at 89–90. Similarly, in Nebraska, while 80.4% of the population supports capital punishment in the abstract, death penalty support drops to 51.6% when the defendant would be parole ineligible for 25 years, to 46.4% when the defendant would be parole ineligible for 40 years, and to 42.9% when the defendant would never be eligible for parole. See *id.*, at 101, 103, 105. Indeed, in Kansas, support for the death penalty drops to the *same level* (49%) when people are presented with the alternative of life without parole or life imprisonment with 40 years of parole ineligibility. See *id.*, at 90.

The situation in Texas is especially troubling. In Texas, the jury determines the sentence to be imposed after conviction in a significant number of noncapital felony cases. In those noncapital cases, Texas law *requires* that the jury be given an instruction explaining when the defendant will become eligible for parole.[3] Thus, the Texas Legislature has recognized that, without such an instruction, Texas jurors may not fully understand the range of sentencing options available to them. Perversely, however, in capital cases, Texas law *prohibits* the judge from letting the jury know when the defendant will become eligible for parole if he is not sentenced to death. The Texas rule unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose.

My primary purpose in writing, however, is not to comment on the merits of petitioner's constitutional claims, but to reiterate the important point that the Court's action in denying certiorari does not constitute either a decision on the merits of the questions presented, see *Singleton* v. *Commissioner*, 439 U. S. 940, 942 (1978) (opinion of

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[3]"In the penalty phase of the trial of a felony case in which the punishment is to be assessed by the jury rather than the court, if the offense of which the jury has found the defendant guilty is listed in Section 3g(a)(1), Article 42.12, of this code or if the judgment contains an affirmative finding under Section 3g(a)(2), Article 42.12, of this code, unless the defendant has been convicted of a capital felony the court shall charge the jury in writing as follows:

. . . . . .

"'Under the law applicable in this case, if the defendant is sentenced to a term of imprisonment, he will not become eligible for parole until the actual time served equals one-half of the sentence imposed or 30 years, whichever is less, without consideration of any good conduct time he may earn. If the defendant is sentenced to a term of less than four years, he must serve at least two years before he is eligible for parole. Eligibility for parole does not guarantee that parole will be granted.'" Tex. Code Crim. Proc. Ann., Art. 37.07, §4(a) (Vernon Supp. 1997); see also *id.*, §4(b)–(c).

STEVENS, J., respecting denial of certiorari), or an appraisal of their importance. Moreover, as was true of the underlying issue raised in three related cases in 1983,[4] and resolved three years later in *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the likelihood that the issue will be resolved correctly may increase if this Court allows other tribunals "to serve as laboratories in which the issue receives further study before it is addressed by this Court."[5]

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[4]*McCray* v. *New York*, 461 U. S. 961 (1983) (cert. denied); *Miller* v. *Illinois*, 461 U. S. 961 (1983) (cert. denied); *Perry* v. *Louisiana*, 461 U. S. 961 (1983) (cert. denied).

[5]*McCray*, 461 U. S., at 962–963 (opinion of STEVENS, J., respecting denial of certiorari).